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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 34 20

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL., APPELLANTS,

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMING

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

FILED FEBRUARY 2, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

24007

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), 1338 Eye Street, N. W., Washington, D. C.; Patrick T. Fagan, 822 Woodbourne Avenue, Brookline, Pittsburgh, Pa.; Harry V. Winegar, 1750 Beach Street, San Francisco, California; Jack M. Elkin, 541 Roscoe Street, Chicago, Illinois; Rudolph Hinden, 4001 Barrington Road, Baltimore, Maryland; George P. Poole, 2413 No. Bouvier Street, Philadelphia, Pa.; Olivia Israeli Abelson, 138 Lynhaven Drive, Alexandria, Virginia; Joseph D. Phillips, 1453 Massachusetts Avenue, N. W., Washington, D. C.; Charles G. Shane, 1918 Briggs Street, Philadelphia, Pa.; Albert J. Rieck, 2136A N. 62nd St., Wauwatosa, Wisconsin; Richard Weber, 3783 Pennypack Street, Philadelphia, Pa.; L. E. Tempest, 2531 North 18th Street, Philadelphia, Pa.; Margery Mitchell, 1309 Montgomery St., San Francisco, California, Plaintiffs,

v.

HARRY B. MITCHELL, LUCILLE FOSTER MCMILLIN and ARTHUR S. FLEMMIN, Defendants

COMPLAINT FOR INJUNCTION AND FOR DECLARATORY RELIEF—Filed April 25, 1944

To the Honorable Justices of the District Court of the United States for the District of Columbia:

[fol. 2] This is an action to enjoin defendants, purporting to act as members of the United States Civil Service Commission, from enforcing, threatening to enforce, or otherwise acting pursuant to the second sentence of Section 9 (a), 18 U. S. C. Section 61h (a), and for a declaratory judgment of the invalidity of these provisions of law, and regulations incorporated into these provisions, or promulgated pursuant thereto.

1. Jurisdiction of this action is invoked under the provisions of Section 11.306 of the District of Columbia Code, 28 U. S. C. Ø 380 (a), and 28 U. S. C. Ø 490.

2. Plaintiff United Federal Workers of America is an unincorporated association, a labor union, whose national office is located at 1338 Eye Street, Northwest, in the District of Columbia. Its membership is composed of employees of the United States Government, and it is affiliated with the Congress of Industrial Organizations (hereinafter referred to as C. I. O.) Its membership includes employees of the Federal Government, in addition to the individual plaintiffs herein, who are within the classified civil service and subject to the provisions of the second sentence of Section 9(a) of the Hatch Act.

3. Plaintiff Patrick T. Fagan is a citizen of the United States, a resident of Pittsburgh, Pennsylvania, and is employed by the War Manpower Commission as Area Director, Area IX. This position is under the classified civil service.

4. Plaintiff Harry V. Winegar is a citizen of the United States, a resident of San Francisco, California, and is employed by the Bureau of Prisons of the Department of Justice as Senior Officer. This position is under the classified civil service.

5. Plaintiff Jack M. Elkin is a citizen of the United States, a resident of Chicago, Illinois and is employed by the Railroad Retirement Board as Senior Economic Statistician. This position is under the classified civil service.

6. Plaintiff Rudolph Hindin is a citizen of the United States, a resident of Baltimore, Maryland, and is employed by the Federal Security Agency as Procedural Assistant. This position is under the classified civil service.

7. Plaintiff George P. Poole is a citizen of the United States, a resident of Philadelphia, Pennsylvania, and is employed by the United States Mint as a Roller. This position is under the classified civil service.

8. Plaintiff Olivia Israeli Abelson is a citizen of the United States, a resident of Alexandria, Virginia, and is employed by the Social Security Board of the Federal Se-

curity Agency as Associate Financial Analyst. This position is under the classified civil service.

9. Plaintiff Joseph D. Phillips is a citizen of the United States, a resident of the District of Columbia, and is employed by the War Shipping Administration as Labor Economist. This position is under the classified civil service.

[fol. 3] 10. Plaintiff Charles G. Shane is a citizen of the United States, a resident of Philadelphia, Pennsylvania, and is employed by the Frankford Arsenal of the War Department as Lens Grinder, Senior. This position is under the classified civil service.

11. Plaintiff Albert J. Rieck is a citizen of the United States, a resident of Wauwatosa, Wisconsin, and is employed by the Veterans Administration at Wood, Wisconsin as Stock Clerk. This position is under the classified civil service.

12. Plaintiff Richard Weber is a citizen of the United States, a resident of Philadelphia, Pennsylvania, and is employed by the Frankfort Branch of the War Department as Machinist Specialist. This position is under the classified civil service.

13. Plaintiff L. E. Tempest is a citizen of the United States, a resident of Philadelphia, Pennsylvania, and is employed by the Philadelphia Navy Yard as Electric Welder. This position is under the classified civil service.

14. Plaintiff Margery Mitchell is a citizen of the United States, a resident of San Francisco, California, and is employed by the National War Labor Board as Wage Analyst. This position is under the classified civil service.

15. Defendants Harry B. Mitchell, Lucille Foster McMillen, and Arthur S. Flemming are individuals found, doing business, and resident in the District of Columbia, with offices at 7th and F Streets, Northwest, in the District of Columbia, and purporting to act as the United States Civil Service Commission.

16. The major purpose for which the United Federal Workers of America (hereinafter referred to as UFWA) is organized is the improvement of working conditions of employees of the Federal Government. Since salary, hours

of work, and other conditions of employment are fixed by statute, the membership of UFWA must engage in legislative activity to achieve these objectives.

In addition, UFWA members and other government employees are affected by legislative action relating to cost of living, rights of organized and unorganized workers and the conduct of the war. Therefore, UFWA members have a vital interest in the election of representatives to Congress who will strive to improve the conditions of Federal workers, keep down the cost of living, protect the rights of organized and unorganized workers and constructively aid in the conduct of the war.

17. As a national organization, the United Federal Workers of America has an interest in protecting and restoring the rights of its membership. It brings this action as a representative of, and on behalf of, all of its members, including those who have not specifically joined in suing individually, who are subject to the provisions of the second sentence of Section 9(a) of the Hatch Act.

18. In discharge of their duties of citizenship, of their right to vote, and in exercise of their constitutional rights of freedom of speech, of the press, of assembly, and the right to engage in political activity, the individual plaintiffs [fol. 4] desire to engage in the following acts: write for publication letters and articles in support of candidates for office; be connected editorially with publications which are identified with the legislative program of UFWA and candidates who support it; solicit votes, aid in getting out voters, act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; participate in and help in organizing political parades; initiate petitions, and canvass for the signatures of others on such petitions; serve as party ward committeeman or other party official; and perform any and all acts not prohibited by any provision of law other than the second sentence of Section 9(a) and Section 15 of the Hatch Act, which constitute taking an active part in political management and political campaigns. In the case of the plaintiff Poole, he has performed many of those acts in the past and intends to continue in this course of conduct.

19. Section 9(a) of the Hatch Act, as amended, 53 Stat. 1148; 54 Stat. 767, U. S. C. Ø 61, provides in part:

> "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war materials, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects. For the purpose of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws."

20. Section 15 of the Hatch Act, as amended, 54 Stat. 767; 18 U. S. C. Ø 15, provides:

> "The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil service rules prohibiting such employees from taking any active part in political management or in political campaigns (act of August 2, 1939, sec. 15 added July 19, 1940, 54 Stat. 767)."

21. Civil Service Rule I provides in part:

> "Persons who by the provisions of these rules are in the competitive classified service, while retaining the

right to vote as they please and to express their opinion on all political subjects, shall take no active part in political management or in political campaigns."

22. The activities prohibited by the second sentence of Section 9(a) of the Hatch Act, by the operation of Section 15 thereof, and prohibited by Civil Service Rule I are set out in the publication issued by defendants entitled "United [fol. 5] States Civil Service Commission Form 1236, September 1942, *Political Activity and Political Assessments of Federal Officeholders and Employees*", a copy of which is attached hereto as Exhibit I. Among the activities prohibited are those enumerated in paragraph 18 hereof.

23. The penalty for violation of the prohibition of the second sentence of Section 9 of the Hatch Act and Civil Service Rule I which is incorporated therein by Section 15 of the Hatch Act, is prescribed by the following provision of Section 9 of the Hatch Act:

> "Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person (act of August 2, 1939, sec. 9, 53 Stat. 1148, as amended July 19, 1940, 54 Stat. 767)."

24. Civil Service Rule XV provides:

> "Legal appointment necessary to compensation. Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall

make no payment or allowance of the salary or wages of any such person or employee thereafter accruing (Executive Order No. 8705, March 5, 1941)."

25. These pretended statutes and regulations purport to charge the United States Civil Service Commission with the duty of enforcing the second sentence of Section 9(a) of the Hatch Act and Civil Service Rule I, which is incorporated into the second sentence of Section 9(a) of the Hatch Act by Section 15 thereof, and of causing the discharge of any member of the classified civil service who violates these provisions.

26. The individual defendants, Mitchell, McMillin, and Flemming, purporting to act as the United States Civil Service Commission, have in the past caused the removal of Federal employees in the classified civil service for violation of the second sentence of Section 9(a) of the Hatch Act, and Civil Service Rule I, incorporated therein by Section 15 of the Hatch Act, and threaten to cause removals for such violations in the future.

27. If individual plaintiffs above named engage in the activities specified in paragraph 18 hereof, the individual defendants have threatened to cause plaintiffs to be dismissed, and in the case of plaintiff Poole, the individual defendants have already commenced proceedings for his dismissal from the employ of the United States Government. By reason of the purported authority of the individual defendants, they are in a position to secure the actual dismissal of the individual plaintiffs from Federal service.

[fol. 6] 28. Such dismissal from Federal employment would constitute immediate irreparable injury.

29. If plaintiffs are dismissed from Federal employment for engaging in the activities specified in paragraph 18 hereof, they would not have available any adequate remedy at law.

30. There exists no other adequate remedy at law by which plaintiffs may presently protect the rights of which they are deprived by the provisions of Section 9(a) of the Hatch Act.

31. The second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States as a

deprivation of freedom of speech, of the press, and of assembly in violation of the First Amendment.

32. The second sentence of section 9(a) of the Hatch Act is repugnant to the Constitution of the United States as a deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments.

33. The second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States, since it unreasonably prohibits Federal employees from engaging in activities which may be lawfully carried on by persons who are not Federal employees, thus constituting a deprivation of liberty in violation of the Fifth Amendment.

34. The second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States since it effects an arbitrary and grossly unreasonable discrimination between employees of the Federal Government in the classified civil service subject to its provisions and employees specifically exempted therefrom, in violation of the Fifth Amendment.

35. The second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States since it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law, in violation of the Fifth Amendment.

36. The acts of the individual defendants Mitchell, McMillin, and Flemming, in threatening to enforce the second sentence of Section 9(a) of the Hatch Act, are unlawful, arbitrary, capricious, and without official authority, in violation of the hereinabove mentioned provisions of the Constitution of the United States and the rights of the plaintiffs guaranteed thereunder.

37. Unless the individual defendants are permanently enjoined from enforcing the second sentence of Section 9(a) of the Hatch Act, plaintiffs will be unable to engage in the activities specified in paragraph 18 above, except by incurring the penalty of removal from employment. The individual plaintiffs are thus now deterred from exercising their lawful right to engage in political activity, and plain-

tiff UFWA is unable to effectuate fully its legislative pro-
[fols. 7-38] gram. In addition, unless the defendants are enjoined from enforcing the second sentence of Section 9(a) of the Hatch Act, plaintiffs will be deterred from exercising their lawful right to engage in political activity in connection with the forthcoming election of electors for the offices of President and Vice President of the United States, and of members of Congress; an election in which vital issues relating to the conduct of the war, the cost of living, and the rights of organized and unorganized workers will be presented. In the premise, plaintiffs will suffer irreparable injury for which they have no adequate remedy at law.

Wherefore, plaintiffs pray that the court grant a preliminary and permanent injunction enjoining defendants from enforcing the provisions of the second sentence of Section 9(a) of the Hatch Act, and render a declaratory judgment that it is repugnant to the Constitution of the United States, and that the court grant the plaintiffs such other and further relief as may be just and equitable in the premise.

Lee Pressman, Attorney for Plaintiffs, 718 Jackson Place, N. W., Washington, D.C.

Duly sworn to by Joseph D. Phillips. Jurat omitted in printing.

[fol. 39] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DESIGNATING THREE-JUDGE STATUTORY COURT—Filed May 8, 1944

Upon request of Judge James W. Morris, of the United States District Court for the District of Columbia, before whom there is pending in the above entitled cause a complaint filed by plaintiffs for an injunction to restrain enforcement of the second sentence of Section 9(a) of the Hatch Act of August 2, 1939, as amended, Title 18 U. S. C. Section 61h(a), and for a judgment declaring that it is repugnant to the Constitution of the United States, and a motion filed by plaintiffs for an interlocutory injunction to restrain enforcement of the aforesaid second sentence of

Section 9(a) of the Hatch Act pending final determination of the above entitled cause and notice of the filing of this action and motion for interlocutory injunction having been given to the Attorney General, I hereby designate Judge Jennings Bailey and Judge James W. Morris, of the United States District Court for the District of Columbia, to participate with me, presiding judge of the United States Court of Appeals for the District of Columbia, as a three-judge statutory court to hear and determine these matters.

Dated: May 8, 1944.

D. Lawrence Groner, Chief Justice of United States Court of Appeals for the District of Columbia, and Senior Circuit Judge.

[fol. 40] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION FOR INTERLOCUTORY INJUNCTION—Filed April 25, 1944

Upon the annexed verified complaint and upon the affidavits of Patrick T. Fagan, Harry V. Winegar, Jack M. Elkin, Rudolph Hindin, George P. Poole, Olivia Israeli Abelson, Joseph D. Phillips, Charles G. Shane, Albert J. Rieck, L. E Tempest, and Margery Mitchell, plaintiffs move the Court to issue an interlocutory injunction, restraining defendants, or any persons authorized by them or acting on their behalf, from enforcing the provisions of the second sentence of Section 9(a) of the Hatch Act of August 2, 1939, as amended, Title 18 U. S. C. Section 61h (a) against the individual plaintiffs herein and the members of plaintiff United Federal Workers of America (C. I. O.) on whose behalf it brings the above entitled action, pending the final hearing and determination of this cause.

The grounds of this motion, as more fully set forth in the annexed Complaint and in the annexed affidavits of the above named individuals, are that:

a. The second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States in that it deprives the individual plaintiffs in the above-entitled cause, and those members of the United Federal

Workers of America (C. I. O.) who are within the classified civil service and not otherwise exempt from the prohibitions of the second sentence of Section 9(a) of the Hatch Act, of their freedom of speech, of the press and of assembly, in violation of the First Amendment; it deprives them of the fundamental right to engage in political activity reserved to the people by the Ninth and Tenth Amendments; and it deprives them of liberty without due process of law in violation of the Fifth Amendment.

b. The defendants, unless enjoined, threaten to enforce the provisions of the second sentence of Section 9(a) of the Hatch Act.

c. The enforcement of the second sentence of Section 9(a) of the Hatch Act will cause immediate and irreparable injury to the individual plaintiffs herein and those members [fol. 41] of the United Federal Workers of America (C. I. O.) on whose behalf it brings the above entitled action.

d. Unless the enforcement of the second sentence of Section 9(a) of the Hatch Act be restrained pending final disposition of the action, the injury to the individual plaintiffs herein and the members of United Federal Workers of America (C. I. O.), subject to its provisions, will be irreparable, even by final judgment for plaintiffs.

e. No injury will be sustained by the defendants or by the public through issuance of an interlocutory injunction.

(Signed) Lee Pressman, Attorney for Plaintiffs.

[fol. 42] In the District Court of the United States

[Title omitted]

Affidavit of Plaintiff Richard Weber—Filed April 25, 1944

State of Pennsylvania,
County of Philadelphia, ss:

I, Richard Weber, being duly sworn, depose and say:

I live at 3783 Pennypack Street, Philadelphia, Pennsylvania. I am a citizen of the United States and a federal worker employed by the Frankford Branch of the United States War Department as machinist specialist. I have

been employed by the U. S. Government since November 1939. My present position is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

[fol. 43] I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells", by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that, the second sentence of Section 9(a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will [fol. 44] be unable freely to exercise my rights as a citizen.

Richard Weber.

Signed and subscribed to before Nathan E. Rowland, Notary Public. My Commission Expires Feb. 19, 1945.

[fol. 45] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF GEORGE P. POOLE—Filed April 25, 1944

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I, George P. Poole, being duly sworn, depose and say:

I live at 2413 No. Bouvier St., Philadelphia, Pennsylvania. I am a citizen of the United States and a federal worker employed by the United States Mint at Philadelphia as a Roller. I have been employed at the Mint since August 1940. My present position is within the classified civil service.

I have for a long time been interested in political activities. Both before and since my employment in the United States Mint, I have taken an active part in political campaigns and political management. In the 28th Ward, 7th Division in the City of Philadelphia I am and have been a Ward Executive Committeeman. In that position I have on many occasions taken an active part in political management and political campaigns. I have visited the residents of my Ward and solicited them to support my party and its candidates; I have acted as a watcher at the polls; I have contributed money to help pay its expenses; I have circulated campaign literature, placed banners and posters in public places, distributed leaflets, assisted in organizing po-
[fol. 46] litical rallies and assemblies, and have done any and all acts which were asked of me in my capacity as a Ward Executive Committeeman. I have engaged in these activities both before and after my employment in the United States Mint. I intend to continue to engage in these activities on my own time as a private citizen, openly, freely, and without concealment.

However, I have been served with a proposed order of the United States Civil Service Commission, dated January 12, 1944, which advises me that because of the political activities mentioned above, and for no other reason, "it is, * * *, the opinion of this Commission that George P. Poole, an employee of the United States Mint at Philadelphia, Pennsylvania, has been guilty of political activity in violation of Section 1, Civil Service Rule I" and that unless

I can refute the charges that I have engaged in political activity, I will be dismissed from my position as a Roller in the United States Mint at Philadelphia, Pennsylvania.

I do not wish to, and will not deny my political activity and I propose to continue to engage in such activity since it is to me the most important activity in which any citizen can engage. I believe that neither the Civil Service Commission nor the Congress has the constitutional power to prohibit me from engaging in these political activities or to punish me for engaging in them by dismissing me from my federal job. Loss of my federal position would result in immediate and serious financial loss to me. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law against me, that [fol. 47] Commission has threatened to take away the means of my livelihood solely because I have exercised my constitutional rights as a citizen.

George P. Poole.

Signed and subscribed to before Eugene J. Hagerty, Notary Public. My commission expires April 6, 1947.

[fol. 48] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF JACK M. ELKIN—Filed April 25, 1944

[fol. 49] I, Jack M. Elkin, being duly sworn, depose and say:

I live at 541 Roscoe Street, Chicago 13, Illinois. I am a citizen of the United States and a federal worker employed by the Railroad Retirement Board as Senior Economic Statistician. I have been employed by the U. S. Government since May 1934. My present position is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions

it is my earest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners [fol. 50] and posters in public places, by distributing leaflets, by "ringing doorbells", by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9(a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

Signed Jack M. Elkin.

Signed and subscribed to before Agnes M. Johnson, Notary Public. My commission expires: Feb. 15, 1944.

[fol. 51] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF CHARLES G. SHANE—Filed April 25, 1944

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

I, Charles G. Shane, being duly sworn, depose and say:

I live at 1918 Briggs Street, Philadelphia, Pennsylvania. I am a citizen of the United States and a federal worker employed by the Frankford Arsenal of the U. S. War Department as a Lens Grinder, Senior. I have been employed at the Frankford Arsenal since August 1940. My present position is within the classified civil service, and I have been in the classified civil service since 1919.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

[fol. 52] I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells", by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the sec-

ond sentence of Section 9(a) of the Hatch Act and the Rules of the C.S.C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

At the last Congressional election I was very much interested in the outcome of the campaign and offered to help the party of my choice by being a watcher at the polls. I obtained a watcher's certificate but I was advised that there might be some question of my right to use the certificate and retain my federal employment. Therefore, on November 1, 1943, the day before election, I called the regional office of the Civil Service Commission in Philadelphia and spoke to a person who gave his name as Harold Dunlap. [fol. 53] Mr. Dunlap stated that if I used my watcher's certificate, the Civil Service Commission would see that I was dismissed from my job at the Frankford Arsenal for violation of the Hatch Act. I, therefore, did not use the certificate as I had intended.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise by rights as a citizen.

Charles G. Shane.

Signed and subscribed to before 1-25-44. Edward B. Buckey, Notary Public.

[fol. 54] In the District Court of the United States

[Title omitted]

Affidavit of Plaintiff L. E. Tempest—Filed Apr. 25, 1944

State of Pennsylvania,
County of Philadelphia, ss:

I, L. E. Tempest, being duly sworn, depose and say:

I live at 2531 North 18th Street, Philadelphia, Pennsylvania. I am a citizen of the United States and a federal worker employed by the Philadelphia Navy Yard as electric welder. I have been employed by the U. S. Govern-

ment since March 6, 1940. My present position is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

[fol. 55] I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells," by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9(a) of the Hatch Act and the Rules of C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

L. E. Tempest.

Signed and subscribed to before Jan. 26/44. Alex Burchulz, Notary Public. My Commission Ex. 3-9-47.

[fol. 56] IN THE DISTRICT COURT OF THE UNITED STATES

AFFIDAVIT OF PLAINTIFF HARRY V. WINEGAR—Filed April 25, 1944

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Harry V. Winegar, being duly sworn, depose and say: I live at 1750 Beach Street, San Francisco, State of California. I am a citizen of the United States and a federal worker employed by United States Department of Justice, Prison Bureau, Alcatraz as Senior Officer. I have been employed by the United States Government since February 1, 1938 and I started working for the United States Department of Justice, Prison Bureau, Alcatraz on February 1, 1938. My present position is within the classified civil service.

At the time, when the fate of the entire world is in balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing [fol. 57] the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells," by addressing campaign literature, and by doing any and all acts of like character reasonably designated to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9(a) of the Hatch Act as the

Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

Harry V. Winegar.

Subscribed and sworn to before me this 18 day of February 1944. Clara E. Hay, Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires April 17, 1944.

[fol. 58] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF JOSEPH D. PHILLIPS—Filed April 25, 1944

[fol. 59] I, Joseph D. Phillips, being duly sworn, depose and say:

I live at 1453 Massachusetts Avenue, N. W., Washington, D. C. I am a citizen of the United States and a federal worker employed by War Shipping Administration as Labor Economist. I have been employed by the U. S. Government since August 16, 1941. My present position is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the

needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells," by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9(a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

[fol. 60] I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

Joseph D. Phillips.

Signed and subscribed to before me this 7th day of February A. D. 1944. Robert S. Bains, Notary Public, D. C. My commission expires Feb. 14, 1945.

[fol. 61] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF ALBERT J. RIECK—Filed April 25, 1944

[fol. 62] STATE OF WISCONSIN,
County of Milwaukee, ss:

I, Albert J. Rieck, being first duly sworn on oath, depose and say:

I live at 2136A N. 62nd St., Wauwatosa, Wisconsin.

I am a citizen of the United States and a federal worker, employed by the Veterans Administration at Wood, Wisconsin, as a stock clerk. I have been employed by the U. S. Government since approximately January 20, 1933. My present position is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and periodicals, by aiding in the campaign of candidates for political office by posting banners and [fol. 63] posters in public places, by distributing leaflets, by "ringing doorbells", by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the sec-

ond sentence of Section 9 (a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

(Signed) Albert J. Rieck.

Sworn and subscribed to before me this 2d day of February, 1944. A. R. Freeman, Notary Public, Milwaukee County, Wis. My commission expires 10-21-45.

[fol. 64] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF OLIVIA ISRAELI ABELSON—Filed April 25, 1944

DISTRICT OF COLUMBIA, ss:

I, Olivia Israeli Abelson, being duly sworn, depose and say: I live at 138 Lynhaven Drive, Alexandria, Virginia. I am a citizen of the United States and a federal worker employed by the Social Security Board of the Federal Security Agency as an Associate Financial Analyst (Grade P-3). I have been employed by the U. S. Government since October 1935. My present position is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions, it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of [fol. 65] candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells", by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9 (a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

(Signed) Olivia Israeli Abelson.

Signed and subscribed to before — this seventh day of February, 1944. Edmund M. O'Sullivan, Notary Public, D. C.

[fol. 66] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF MARGERY MITCHELL—Filed April 25, 1944

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, Margery Mitchell, being duly sworn, depose and say:

I live at 1309 Montgomery Street, San Francisco 4, State of California. I am a citizen of the United States and a federal worker employed by National War Labor Board as Wage analyst. I have been employed by the United States Government since April 1941 and I started working for the National War Labor Board on December 8, 1942. My present position is within the classified civil service.

At the time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pur-
[fol. 67] sue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells," by addressing campaign literature, and by doing any and all acts of like character reasonably designated to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9(a) of the Hatch Act and the

Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionaliy abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

Margery Mitchell.

Subscribed and sworn to before me this 4 day of February, 1944. Clara E. Hay, Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires April 17, 1944.

[fol. 68] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF RUDOLPH HINDIN—Filed April 25, 1944

STATE OF TENNESSEE,
County of Shelby, ss:

[fol. 69] I, Rudolph Hindin, being duly sworn, depose and say:

I live at 4001 Barrington Road, Baltimore, Maryland. I am a citizen of the United States and a federal worker employed by Federal Security as Procedural Assistant. I have been employed by the U. S. Government since June, 1935. My present position is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by [fol. 70] "ringing doorbells," by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly and without concealment. However, I understand that the second sentence of Section 9(a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this constitutional law, I will be unable freely to exercise my rights as a citizen.

(Signed) Rudolph Hindin.

Signed and subscribed to before Michael M. Jablin, Notary Public. My commission expires Oct. 5, 1947.

[fol. 71] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF PLAINTIFF PATRICK T. FAGAN—Filed April 25, 1944

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

[fol. 72] I, Patrick T. Fagan, being duly sworn, depose
Name
and say:

I live at 822 Woodbourne Avenue, Brookline, Pittsburgh,
Full address including city and state
Pa. I am a citizen of the United States and a federal worker employed by War Manpower Commission as
Name of Agency
Area Director Area IX. I have been employed by the
Title of Position
U. S. Government since May 5, 1943. My present position
Date
is within the classified civil service.

At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by "ringing doorbells", by addressing campaign literature, and by doing any and all acts of like character reasonably

[fol. 73] designed to assist in the election of candidates I favor.

I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9 (a) of the Hatch Act and the Rules of the C.S.C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen.

Signed Patrick T. Fagan.

Signed and subscribed to before, Edward G. Nassar, Notary Public. My Commission expires March 17, 1947. (Seal.)

[fol. 74] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTIONS AND MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT—Filed June 26, 1944

Please take notice that upon the pleadings herein, upon the affidavits submitted by plaintiffs in support of their motion heretofore made for an interlocutory injunction, upon the affidavit of Lawson A. Moyer, verified the 24th day of June 1944, and upon all the proceedings heretofore had herein, the defendants will move this Court at a special term thereof, on the 29th day of June 1944, on the opening of court on that day or as soon thereafter as counsel can be heard (1) for a motion to dismiss the complaint herein on the ground that it fails to state a claim or controversy against these defendants upon which relief can be granted and on the ground that the court lacks jurisdiction thereof, and (2) for a motion for summary judgment in favor of the defendants on the ground that there are no genuine issues as to any material fact and defendants are entitled to such judgment as a matter of law, and on the ground

that the court lacks jurisdiction to grant the relief requested by the plaintiffs; and for such other and further relief as to the court may seem just and proper.

Francis M. Shea, Assistant Attorney General; Edward M. Curran, United States Attorney, Attorneys for the Defendants.

To: Lee Pressman, Esq., 718 Jackson Place, N. W., Washington, D. C., Attorneys for the Plaintiffs.

[fol. 75] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTIONS—Filed June 26, 1944

CITY OF WASHINGTON,
District of Columbia, ss:

LAWSON A. MOYER, being duly sworn, deposes and says:

I am the Executive Director and Chief Examiner of the United States Civil Service Commission, the members of which are the defendants in the above-entitled action. This affidavit is submitted in support of motions made by said defendants to dismiss the action and for summary judgment.

I am advised that the action is brought to enjoin the Civil Service Commission from enforcing Section 9 (a) of the Hatch Act. I am personally familiar with all the procedures utilized by the Civil Service Commission in the performance of its duties. Except with respect to its own employees, the Civil Service Commission is not authorized to, and does not, enforce the provisions of Section 9 (a) of the Hatch Act. The Civil Service Commission does enforce the provisions of Civil Service Rule I by the method set forth in [fol. 76] Rule XV of the Rules of the Civil Service Commission as to Federal employees in the competitive classified service.

The established procedure for the enforcement of Civil Service Rule I is as follows:

When there is a charge of political activity on the part of a classified Federal employee, an investigation is made, generally jointly by the representatives of the Civil Service Commission and the department or agency employing the individual in question. During this investigation the

individual is afforded an opportunity to be heard. The report of this investigation is submitted to the Civil Service Commission and if the Commission reaches the preliminary conclusion that a violation of Civil Service Rule I has been established, it issues a proposed order containing a complete statement of the charges against the employee and the evidence substantiating such charges. The employee is given an opportunity within 15 days, or such further time as may be allowed, to respond to such charges and present any evidence to rebut such charges, and to request a hearing before the Commission or its Examiner. At such hearing, the employee may be represented by counsel, and may request the filing of briefs. Upon the conclusion of the hearing the Commission, after due consideration of the entire record of the case, issues a final order. In event the charges are sustained, a copy of such order, in accordance with Rule XV, is sent to the department or agency in which the individual is employed, advising that such individual has been found to have violated Civil Service Rule I, and recommending that said employee be removed. In the event the head of the particular department or agency fails to remove said employee, the Civil Service Commission, [fol. 77] pursuant to Rule XV, instructs the proper disbursing officer to withhold payment of any salary or wages thereafter accruing to such employee.

I have caused an examination to be made of the files and records of the Civil Service Commission with reference to whether any proceedings have been instituted or any disciplinary action has been taken against any of the individual plaintiffs named in the above-entitled action. With the exception of plaintiff George P. Poole, such records disclose that no proceedings of any kind have been instituted against said plaintiffs and no disciplinary action of any kind has been taken against any of them. With reference to plaintiff George P. Poole, the records of the Civil Service Commission disclose that an investigation has been conducted jointly by the Civil Service Commission and by the Treasury Department with respect to alleged political activities engaged in by the said George P. Poole. As a result of such investigation, a proposed order was issued on January 12, 1944. A copy of this proposed order is annexed hereto as Exhibit A. This proposed order setting forth the preliminary finding of the Civil Service Commission was transmitted to plaintiff George P. Poole at 2413 North

Bouvier Street, Philadelphia, Pennsylvania, by registered mail on January 17, 1944 and said plaintiff George P. Poole was advised that he had 15 days within which to reply to the charges and to present any evidence he might have to refute them.

Thereafter, on March 2, 1944, one Lewis F. McCabe, as attorney for George P. Poole, requested, on behalf of said plaintiff George P. Poole, an extension of time within which to file an answer to the said proposed order. This request was considered by the United States Civil Service Com- [fol. 78] mission and on the date of March 28, 1944, over my signature and by direction of the Commission, a letter was sent to Lewis F. McCabe, attorney, advising him that the Commission had decided that it would continue to accept any answer that may be filed by him in the case of George P. Poole. To date, no answer to the charges set forth in the proposed order has been filed by either George P. Poole, individually, or by his attorney, Lewis F. McCabe, nor has any request for a hearing been made. The case of George P. Poole is still pending and the Commission, at the present time, is ready, as it has advised said Lewis F. McCabe, to accept and consider any answer and request for hearing which may be filed on behalf of George P. Poole. No final order has been issued with respect to said plaintiff George P. Poole.

I am advised that the plaintiffs have annexed to their complaint a copy of a pamphlet issued by the Civil Service Commission dealing with the rules and regulations affecting the political activities and political assessments of federal employees. A new pamphlet was issued in January 1944 which is now in effect and this pamphlet is annexed hereto as Exhibit B.

I am also annexing to this affidavit, as Exhibit C, a copy of the Civil Service Commission Rules dated September 1939, which contains on pages 5 through 9, certain provisions regarding political activities by federal employees. I am advised and believe that some of these provisions were included by reference in the second Hatch Act.

Lawson A. Moyer.

Subscribed and sworn to before me this 24th day of June 1944. R. E. Soneder, Notary Public of District of Columbia. My commission expires Jan. 14, 1946.

[fol. 79] EXHIBIT "A" TO AFFIDAVIT

UNITED STATES OF AMERICA BEFORE THE UNITED STATES CIVIL SERVICE COMMISSION

Proposed Order Federal Docket No. 1101

In the Matter of GEORGE P. POOLE, Roller, United States Mint, Philadelphia, Pennsylvania

The United States Civil Service Commission, being in receipt of a report of investigation jointly conducted by representatives of the Commission and the Treasury Department of alleged political activity on the part of George P. Poole, Roller, United States Mint, Philadelphia, Pennsylvania and having carefully considered the same, adopts the following Proposed Order:

I

It is charged:

That on or about August 6, 1940 the said George P. Poole was employed in the position of Roller, United States Mint, Philadelphia, Pennsylvania, a position in the classified civil service of the United States. That by virtue of the said employment, the said George G. Poole was subject to the provisions of Section 1, Civil Service Rule I, prohibiting political activity and while so employed did take an active part in political campaigns and political management, in that,

The said George P. Poole held the political party office of Democratic Ward Executive Committeeman in the City of Philadelphia, Pennsylvania.

The said George P. Poole was politically active by aiding and assisting the Democratic Party in the capacity of worker at the polls on general election day, November 5, 1940, and assisted in the distribution of funds in paying party workers for their services on general election day, November 5, 1940.

[fol. 80] II

The above charges are substantiated by:

a. Admissions of the said George P. Poole and records in the office of the Philadelphia Board of Elections that the

said George P. Poole was elected Democratic Ward Executive Committeeman in the years 1934, 1936, 1938 and 1940.

b. The employment records in the United States Mint, Philadelphia, Pennsylvania which reveal that the said George P. Poole has been an employee of the Mint in various capacities and at periodic times since May 2, 1935.

c. The leave records at the United States Mint, Philadelphia, Pennsylvania which reveal that the said George P. Poole was on leave from duty at the Mint on general election day, November 5, 1940.

d. Records in the office of the Philadelphia Board of Elections which reveal that a Democratic Watcher's Certificate was issued in the name of George P. Poole for use at the polling place on registration day, October 1, 1940, in the City of Philadelphia, Pennsylvania.

e. Records in the office of the Philadelphia Board of Elections which reveal that the said George P. Poole became a candidate for Democratic Ward Executive Committeeman for the 28th Ward, 7th Division and was elected thereto on April 23, 1940 for a two-year term.

f. Records in the office of the Philadelphia Board of Elections which reveal that the said George P. Poole was paid the sum of $9.00 for his services as worker in the election of November 5, 1940.

g. Admissions of the said George P. Poole that he was active at the polls on general election day, November 5, 1940, and that he advanced the sum of $25.00 to a committeeman to pay party workers in his Division.

h. Admissions of the said George P. Poole and the statement of witnesses that the said George P. Poole was the recognized Democratic Ward Executive Committeeman for the 28th Ward, 7th Division, Philadelphia, Pennsylvania during said term of office to which he was elected on April 23, 1940. The said George P. Poole at his personal [fol. 81] interview admitted that he was Democratic Ward Executive Committeeman and that he was active at the polls on November 5, 1940 but denied that he served as a watcher on registration day, October 1, 1940.

III

The above described activity constitutes taking an active part in political management and in a political campaign in contravention of Section 1, Civil Service Rule I, and the regulations adopted by the Commissioners thereunder.

IV

It is, therefore, the opinion of this Commission that George P. Poole, employee of the United States Mint, Philadelphia, Pennsylvania, has been guilty of political activity in violation of Section 1, Civil Service Rule I, and it is *Ordered* that George P. Poole be so notified and that in accordance with the procedure established in such cases he be allowed fifteen days from the date of receipt of said notification in which to reply to these charges and to present any additional evidence he may have to refute them.

The United States Civil Service Commission. Alfred Klein, Acting Chief Law Officer.

Approved at Washington, D. C. this 12th day of January, 1944.

EXHIBIT "B" TO AFFIDAVIT—Filed June 26, 1944, Charles E. Stewart, Clerk

FORM 1286
January 1944

UNITED STATES CIVIL SERVICE COMMISSION

POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS

OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

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POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

I. GENERAL PROHIBITIONS

1. Civil-service rule I and the act of August 2, 1939 (as amended)—Civil-service rule I, section 1, reads as follows:

No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns.

The act of August 2, 1939, as amended (U. S. Code, title 18, section 61), provides in part as follows:

It shall be unlawful for any person employed in any administrative position by the United States, or by any department, independent agency, or other agency of the United States (including any corporation controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof) * * *, to use his official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the Office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions (act of August 2, 1939, sec. 2, 53 Stat. 1147, as amended July 19, 1940, 54 Stat. 767).[1]

It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material,[2] shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President

[1] Penalty for violation of this section is a fine of not more than $1,000 or imprisonment for not more than 1 year or both (act of August 2, 1939, sec. 8, 53 Stat. 1148).

[2] Title VII, Public Law 507, 77th Cong., approved March 27, 1942.

of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person (act of August 2, 1939, sec. 9, 53 Stat. 1148, as amended July 19, 1940, 54 Stat. 767).

For the purposes of this Act, persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States, except that for the purposes of the second sentence of section 9 (a) the Commissioners and the Recorder of Deeds of the District of Columbia shall not be deemed to be officers or employees (act of August 2, 1939, sec. 14 added July 19, 1940, 54 Stat. 767).

The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns (act of August 2, 1939, sec. 15 added July 19, 1940, 54 Stat. 767).

Nothing in sections 2, 9 (a) or 9 (b), or 12 of this Act shall be deemed to prohibit or to make unlawful the doing of any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization. (act of August 2, 1939, sec. 21 added October 24, 1942, Public Law 754, 77th Cong.).

The rule and the statutes quoted above are general prohibitions against participation in politics by officers and employees of the Government. All officers and employees of the Government are, in addition, subject to a number of statutes relating to solicitation of political contributions, political coercion, political discrimination, and the purchase and sale of public office, which are set forth in sections of this publication.

Every Government employee is expected to be familiar with the statutes and the rules relating to political activity; ignorance does not excuse their violation. Each appointee to the classified service on entering on duty is required to sign a statement that he will familiarize himself with the rule and the laws relating to political activity.

II. JURISDICTION OF THE COMMISSION

2. **Federal employees.**—There is no language in the Hatch Act fixing responsibility for enforcement as to Federal employees. Thus, enforcement of section 9 as to these employees devolves upon the individual departments and independent establishments. However, it is important to note that civil-service rule I, which uses prohibitive language identical with that in the Hatch Act, is still in full force and effect as to employees in the competitive classified service. Indeed, subsequent to the passage of the Hatch Act this rule has been amended to conform with prohibitive language in section 9 of the Hatch Act, by Executive Order No. 8705, March 5, 1941, and promulgated anew. Thus, the Commission has jurisdiction to enforce the political-activity restrictions of the rule, and this jurisdiction, under an opinion of the Attorney General of the United States dated January 8, 1941, is concurrent with the statutory responsibility of the individual employing departments and independent establishments as to employees in the competitive classified service.

Prior to the passage of the Hatch Act, the Commission had authority to impose penalties for violations of the rule ranging from a reprimand or suspension to removal. The Attorney General held in the opinion referred to above that in cases where both the law and the civil service rule were violated the statutory penalty, which is removal from the service, is *mandatory*. The law definitely *states with respect to* Federal employees that a person found to have committed a violation must be immediately removed from the position or office held by him and must not be reemployed in such position or office (sec. 9 (b)).

Civil-service rule XV reads as follows:

Legal appointment necessary to compensation.—Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing (Executive Order No. 8705, March 5, 1941).

The General Accounting Office is without jurisdiction to review the determinations of the Civil Service Commission under rule XV and, upon certification by the Commission that an employee is holding a position in violation of the Civil Service Act and rules, the General Accounting Office has no alternative to withholding credit for payments made for salary or compensation (decision, Comptroller General, July 20, 1939, to the Postmaster General).

With respect to employees in nonclassified or excepted positions, the jurisdiction to determine whether or not there has been a violation of the Hatch Act is vested in the head of the department or independent establishment concerned with making the removal (opinion, Attorney General, July 22, 1940). However, this jurisdiction is limited by section 15 of the act to a determination of facts. Thus, the head of the department or independent establishment may decide whether or not an employee under his jurisdiction did in fact engage in certain activities. However, the question of whether such activities constitute a violation would, under the act, be determined by application of section 15, which provides that those activities are to be considered as in violation of the act which the Commission had theretofore determined were in violation of the civil-service rules prohibiting political activity.

3. **Civil Service Commission regulations.**—In taking action on alleged violations of section 1 of civil-service rule I, the Civil Service Commission proceeds under the following regulations:

(1) **Investigations.**—(a) Investigations of charges of political activity on the part of an officer or employee (both hereinafter comprehended within the term "employee") subject to the provisions of section 1, civil-service rule I, shall be conducted jointly by representatives of the Commission and of the department or agency where the individual is employed, unless either the Commission or the department or agency signifies that it will be unable to participate in the investigation. The Commission shall be notified of any complaint of political activity received by a department or agency and shall be given an opportunity to cooperate in any investigation that the department or agency may decide to make. Likewise, the Commission will not proceed with any investigation until the department or agency has been notified and has been given an opportunity to participate.

(b) During the course of the investigation the employee shall be afforded an opportunity to make a statement, either personally or in writing, before the investigator, and he shall be allowed to furnish names of witnesses who will support the statements he has made to the investigator.

(2) **Proposed order.**—When the Commission reaches the conclusion that a violation of section 1, civil-service rule I, has been established by the investigation, it shall issue a proposed order. This order, which shall include a statement of the charges against the employee and of the information in support thereof, shall be sent to the employee by registered mail, and he shall be allowed fifteen days from the date of service to respond thereto in writing. A copy of this order shall also be sent to the department or agency in which the individual is employed. With his reply to the proposed order, the employee may request a hearing as hereinafter provided.

(3) **Hearing.**—(a) The granting of a hearing shall not be a matter of right but shall be within the discretion of the Commission. No hearing shall be authorized in cases where the employee has admitted a violation or where a violation is established by indisputable record evidence.

(b) Hearings shall be held before a Hearing Examiner designated by the Commission and shall be at the Commission's office in Washington, D. C., unless the Commission shall order that the hearing be held elsewhere. All testimony shall

be under oath or affirmation. The employee may appear personally or by or with counsel. Counsel appearing shall have been admitted to practice before the Commission in accordance with rule 4 of the Rules of Practice under the act of August 2, 1939, as amended.

(c) The hearing shall be of the limited scope necessitated by the Commission's lack of the power of subpoena in proceedings under section 1, civil-service rule I. Because of the absence of that authority, it cannot undertake to conduct said hearing as a proceeding de novo, or to have evidence introduced therein in support of the charges against the respondent. Owing to the lack of subpoena power, evidence in support of charges must be limited to information given voluntarily. Such information is obtained upon an understanding of confidential treatment. Consequently, evidence supporting the charges cannot be introduced at the hearing. The hearing shall be unilateral, that is, it shall be only for the presentation of evidence on behalf of the employee in rebuttal of the charges disclosed by the proposed order. Counsel for the Commission may cross-examine witnesses.

(d) It shall be within the discretion of the Hearing Examiner to permit, and fix the time for, filing of briefs. The proceeding at the hearing will not be reported, unless the Commission shall so direct; but the employee shall have the privilege of himself having the evidence taken stenographically. If the proceeding is not taken by a reporter on behalf of the Commission, the employee and Commission counsel shall submit a summary thereof to the Hearing Examiner within a time fixed by him. Any disagreement concerning the contents of the summary shall be resolved by the Examiner, and the parties may file written exceptions. The summary and any exceptions shall be certified by the Hearing Examiner and shall become a part of the record.

(4) **Final order.**—(a) The Commission's final order shall be based on the entire record of the case, including the report of the investigation, the reply of the employee to the proposed order and in cases where a hearing has been granted, the report of the Hearing Examiner. If the employee does not reply to the proposed order within fifteen days from the date of service, a final order shall be based on the report of investigation alone.

(b) The final order shall contain a statement of the charges that have been substantiated and shall prescribe the penalty to be imposed. It shall be served on the department or agency wherein the individual is employed, together with a copy to be forwarded to the respondent.

(5) **Penalties.**—(a) Since violations of section 1, civil-service rule I, are by law violations also of section 9 (a) of the Hatch Act, the penalty required by that act must of necessity be imposed. The employee must be immediately removed from the position or office held and may not again be employed in such position or office. If the appointing officer fails to carry out the instructions of the Commission within ten days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officer for proceedings in accordance with civil-service rule XV.

(b) When the Commission recommends the removal of an employee for a violation of section 1, civil-service rule I, and the Hatch Act, the penalty laid down in paragraph (a) of this section shall be applied, even where the department or agency reports that the individual has been removed, on grounds other than a violation of section 1, civil-service rule I, and the Hatch Act, and the individual may not again be employed in the position from which he was removed. The

provisions of section 6 of these regulations regarding reinstatement in positions other than the one from which removal was effected shall also apply.

(c) The above procedure shall apply also where an employee has resigned from his position or office prior to the Commission's determination that he had violated section 1, civil-service rule I, and the Hatch Act.

(6) **Reinstatement.**—An employee removed for violation of section 1, civil-service rule I, may be reinstated, in accordance with the provisions of civil-service rule IX, in any position for which he can qualify other than the one from which he was removed: *Provided*, That the Commission shall in each case establish a period of time after removal, the length of which shall vary with the circumstances of the particular case, during which the reinstatement of the officer or employee to any position in the Federal service will not be approved.

III. APPLICABILITY OF THE RULE AND STATUTE

4. **In general.**—For many years employees in the competitive classified service have been prohibited from taking an active part in politics by civil-service rule I. In addition to this rule, such employees are now subject to the restrictions of the act of August 2, 1939. This is true regardless of whether the classified status was acquired through competitive examination, classification by statute, or classification by Executive order.

Only the first sentence of section 1, civil-service rule I, applies to employees in positions excepted from the competitive classified service. This sentence has been partially enacted in section 2 of the act of August 2, 1939, and violation of this provision of the statute constitutes a criminal offense.

Under section 9 (a) of the act of August 2, 1939, all persons employed in the executive branch of the Federal Government[1] whether or not such persons are in the classified service, are prohibited from using their official authority or influence for the purpose of interfering with an election or affecting the results thereof, and from taking an active part in political management or in political campaigns. It should be noted that by the terms of title VII of Public Law 507, 77th Cong. (Second War Powers Act, approved March 27, 1942), the restriction against taking any active part in political management or political campaigns does not apply in the case of "a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material." However, such employees are subject to the restriction which prohibits the use of official authority or influence for the purpose of interfering with an election or affecting the results thereof.

The Hatch Act expressly reserves to Government employees the right to vote and the right to express their opinions on all political

[1] Except (a) the President and Vice President of the United States; (b) persons whose compensation is paid from the appropriation for the office of the President; (c) heads and assistant heads of executive departments; (d) officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

subjects and candidates. This expression of opinion may be made publicly,[1] but it must not be such as to amount to taking an active part in an organized political campaign. The effect of section 9 (a) of the statute, therefore, is to place the same restrictions upon the political activities of all officers and employees of the executive branch of the Government, as section 1 of civil-service rule I places upon the political activities of employees in the classified service. Moreover, section 15 of the act expressly provides that the activities which are prohibited by the act are the activities which the Commission had theretofore determined were prohibited on the part of employees in the classified civil service by the provisions of the civil-service rules forbidding the taking of an active part in political management or in political campaigns.

5. **Substitute or part-time employees.**—Persons whose employment with the Federal Government is only part-time, or intermittent, not in any case occupying a substantial portion of the individual's time and not affording the employee's principal means of livelihood, are subject to the law while in an active-duty status, not otherwise. Under such conditions employees may hold public elective office or be listed as candidates for such office provided that they do not engage in political activity or political management during periods of active duty. The period of active duty embraces the whole period of status as a paid employee, rather than just the working hours of the day.

6. **Employees on leave.**—It is not permissible for an employee to take leave of absence for the purpose of working for a political committee or organization or of becoming a candidate for elective office with the understanding that he will resign his position if nominated or elected.

7. **Retired employees.**—Persons retired from public office or employment are not regarded as subject to the restrictions of the law. Such persons may engage in politics to the same extent as persons not connected with the public service.

However, in any case where an annuitant is reemployed in the executive branch of the Federal Government, the political-activity restrictions of the act would apply. In this connection it should be noted that the individual's annuity would be suspended by his reentry to the Federal service and he would necessarily be considered as a Federal employee subject to the same political-activity restrictions that are applicable to other employees in the executive branch of the Federal Government.

8. **Postmasters and post office employees.**—For many years the political activities of certain post office employees, such as rural carriers and fourth-class postmasters, were restricted by the terms of specific Executive orders. However, such employees, including all postmasters, are now subject to the political-activity restrictions of section 1 of civil service rule I and section 9 (a) of the Hatch Act.

9. **Star route and contract carriers—special-delivery messengers—clerks in third- and fourth-class post offices.**—It has been held that persons em-

[1] Opinion, Attorney General, January 8, 1941.

ployed in these positions are not employees of the United States within the meaning of the Hatch Act and that consequently the provisions thereof do not apply to them.

10. **Employees in the District of Columbia government.**—The Hatch Act specifically provides that for the purposes of the act persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States. Therefore, the political activities of such employees, with the exception of the Commissioners and the Recorder of Deeds of the District of Columbia, who are not subject to the restriction against taking any active part in political management or in political campaigns, are subject to the same restrictions as are applied to Federal officers and employees.

11. **Attorney General's decisions.**—In addition to the types of employees mentioned in the preceding paragraphs, Circular No. 3301 of the Attorney General's Office, dated October 26, 1939, lists the following officers and employees in the executive branch of the Federal Government as being affected by the provisions of section 9 of the Hatch Act:

(1) United States attorneys and marshals, their assistants and deputies.

(2) Special attorneys of the Department of Justice and special assistants to the Attorney General.

(3) Officers and employees of Governmental agencies, such as the Home Owners' Loan Corporation, the Reconstruction Finance Corporation, and the Public Works Administration.

(4) Officers and employees occupying administrative and supervisory positions in the Work Projects Administration, the National Youth Administration, and the Civilian Conservation Corps.

The same circular states that the act has been construed as not applying to the following:

(1) Officers and employees of the legislative branch of the Federal Government, including secretaries and clerks to Members of Congress and Congressional committees.

(2) Officers and employees of the judicial branch of the Federal Government, including United States commissioners, clerks of United States courts, referees in bankruptcy, and their secretaries, deputies, and clerks.

(3) Persons who are retained from time to time to perform special services on a fee basis and who take no oath of office, such as fee attorneys, inspectors, appraisers, and management brokers for the Home Owners' Loan Corporation, and special fee attorneys for the Reconstruction Finance Corporation.

(4) Persons who receive benefit payments, such as old-age assistance and unemployment compensation under the Social Security Act, rural rehabilitation grants, and payments under the agricultural-conservation program.

The Attorney General also ruled in an opinion to the Secretary of State, dated October 19, 1940 (39 Op. Atty. Gen. 508), that ambassadors and ministers were not prohibited from taking an active part in political campaigns.

IV. PROHIBITED ACTIVITIES*

12. **In general.**—In brief it may be said that the law is designed to prevent those subject to it from assuming general political leadership or from becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office. The following sections are devoted principally to a discussion of activities which had been decided by the Commission as prohibited by the civil-service rules prior to the enactment of section 15 of the Hatch Act, July 19, 1940.

13. **Activity by indirection.**—Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are, therefore, accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

This does not mean that an employee's husband or wife may not engage in politics independently, upon his or her own initiative, and in his or her own behalf. Thus, for example, the Commission has held that the wife of a Federal employee might serve as a member of a board of election officers, it being affirmatively shown that the husband was not involved in politics. Cases have arisen, however, in which the facts showed that the real purpose of a wife's activity was to accomplish a political act prohibited to her husband, the attempt being made for her husband's benefit and at his instigation or even upon his coercion. This may be true of individuals or it may occur among groups of employees' wives, associated for the purpose of securing for their husbands what the husbands may not secure for themselves. In such situations, it is obvious that the prohibitions against political activity are being violated. The collusion or coercion renders the wife's activity imputable to the husband, he being guilty of the same infraction as if he were openly a participant.

14. **Conventions.**—Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance merely as a spectator is permissible, but the employee so attending must not take any part in the convention or in the deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obtrusive demonstration or interference.

15. **Primaries—caucuses.**—An employee may attend a primary meeting, mass convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass this point in participating in its deliberations. He may not act as an officer of the meeting, con-

* All items under this heading are subject to the exceptions in section 18 of the Hatch Act. (See subsection 29, page 15.)

vention, or caucus, may not address, make motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

16. **Meetings.**—Service in preparing for, organizing or conducting a political meeting or rally, addressing such a meeting, or taking any part therein except as a spectator is prohibited.

17. **Committees.**—The holding of the office of Political Committeeman such as precinct committeeman, ward committeeman, etc., or service on or for any political committee or similar organization is prohibited. An employee may attend as a spectator any meeting of a political committee to which the general public is admitted but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether a classified employee may properly serve as a member. Assignment may be to duties which, if considered alone, would seem far removed from active politics but which, when considered as a part of the whole purpose, assume an active political character. Thus the Commission has forbidden a civil-service employee to serve as chairman of the food committee at an occasion signifying the opening campaign speech of a nominee for Governor of a State. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

18. **Clubs and organizations.**—Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances.

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

> That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Membership in a labor union by employees subject to the Hatch Act is not prohibited, where the organization is nonpartisan in character and has as its primary object improvements in the conditions of labor

of its members and other matters related to their individual welfare. Thus, the Commission has held that employees subject to the Hatch Act may hold memberships in the Central Labor Union.

Likewise it has been held that matters concerned solely with organization and management of a union of Federal employees are not political management or political activity in violation of section 9 (a) of the Hatch Act, and that adoption of a resolution limited to these matters would not violate the law.

Section 9A of the act of August 2, 1939, provides as follows:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

Civil-service employees may hold office in organizations established for social betterment. It is pointed out, however, that in certain circumstances activities of such organizations may take on a character of partisan political activity. Employees who become members or officers of organizations of this type must take the responsibility for seeing that the activities in which they engage do not become political in character.

19. **Civic organizations and citizens' associations.**—Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, as amended, provided such activities have no connection with the campaigns of particular candidates or parties.

20. **Contributions.**—Employees may make voluntary contributions to a regularly constituted political organization for its general expenditures, subject to the limitation laid down in section 13 of the act. The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

While employees may make contributions, they may not solicit, collect, receive, disburse, or otherwise handle contributions made for political purposes.

The Commission has held that voluntary contributions may be made at any time, even subsequent to a general election, so long as they are made to a regularly constituted political organization for its general expenditures.

In addition, sections 118 to 121 of the Criminal Code place certain restrictions on contributions by Federal employees. Contributions may not be handed over to another person in the Federal service; they may not be made in a Federal building; etc. For the text of these sections of the Criminal Code and further information on this matter, see

Parts VII, VIII and IX, pages 25 through 30. These sections of the Criminal Code are within the jurisdiction of the Department of Justice and the law provides severe penalties for violations.

21. **Expression of opinions.**—Although the act reserves to employees affected the right to "express their opinions on all political subjects and candidates," this reservation is subject to the prohibition that employees may not take any active part in political management or in political campaigns. Public expression of opinion in such a way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited.

An employee is not prohibited from wearing a political badge or button or displaying a political poster in the window of his home or on his automobile. However, it is regarded as a violation of the spirit of the law for a public servant to make a partisan display of any kind while on duty conducting the public business.

It should be remembered that employees are forbidden to become prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office. Thus, distribution of campaign literature, badges, or buttons is prohibited activity.

22. **Newspapers—publication of letters or articles.**—An employee may not publish or be connected editorially or managerially with any newspaper generally known as partisan from a political standpoint, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use.

The Commission has held that as a general rule a newspaper which is considered as being partisan from a political standpoint, either during the campaign or in the interval between campaigns, is regarded as being subject to application of the regulations against activity in connection therewith. It is not required that a publication be regarded as the organ of a political organization or that it have an official connection with any political organization or party. The terms "editorial and managerial" are intended to apply to responsibilities and duties which have to do with the making of decisions affecting the editorial policies. The objective behind the restriction on activity in connection with such publications or newspapers is prohibition of political activity of a partisan character through the medium of the public press by a person subject to the statute.

Whether or not ownership of stock or membership on a board of directors of a corporation which publishes a daily newspaper is a violation of the political-activity regulations will depend upon the degree to which the individual, by virtue of such ownership or membership, participates in controlling the editorial policy or news management of the publication. If a Federal employee makes decisions or assists in making decisions on editorial policy or news management with respect to the political status of the publication, a violation of

the regulations occurs, but mere ownership of stock would not of itself constitute a violation of the political-activity regulations.

There is no direct prohibition against correspondence work by an employee for newspapers. The employee will have the responsibility, however, of ascertaining that any material he submits is not in contravention of the regulations.

23. **Activity at the polls and for candidates.**—An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 2, sec. 250.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a National character. It is also a criminal offense to promise any employment, position, work, or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party.

An employee subject to the law must avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, or any other partisan political activities at the polls. Rendering partisan political service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of prohibited political activities. This is not intended to prohibit one subject to the act from transporting members of his immediate family to and from the polls, in view of the community of interest that exists in such cases. The foregoing provisions do not apply if the election in question is covered by the exceptions embodied in section 18 of the law of August 2, 1939, as amended. (See subsection 29, page 15.)

24. **Election officers.**—Service as an election officer of any kind, in which an individual's activities are such as to show partisanship or partisan political management, is prohibited.

25. **Parades.**—An employee may not participate in or help organize a political parade. An employee may be a member of a band or orchestra which takes part in parades or rallies provided such band or orchestra is generally available for hire as a musical organization.

26. **Petitions.**—The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridg-

ing the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any Committee or Member thereof, shall not be denied or interfered with."

An employee subject to the law of August 2, 1939, as amended, is permitted to sign petitions, including nominating petitions, as an individual, without reference to his connection with the Government, but he may *not* initiate them, or canvass for the signatures of others, if such petitions are identified with political management or political campaigns. Employees are permitted to exercise the right as individuals to sign a petition favoring a candidate for office, but they may not do so as Government employees or as a group or association of Government employees.

27. **Applying for Presidential positions not in the classified service.**—When a classified employee seeks promotion by appointment or transfer to a Presidential office not in the classified service, there is no objection to his becoming a candidate for such an office, provided the consent of his department is obtained, and provided he does not violate section 1 of rule I, prohibiting the use of his official authority or influence in political matters and provided further that he does not neglect his duty and avoids any action that would cause public scandal or semblance of coercion of his fellow employees or of those over whom he desires to be placed in the position he seeks.

A classified employee may circulate a petition or seek endorsements for his own appointment to a Presidential position, subject to the qualifications above stated, and he may, as an individual, sign a petition or recommend another person for such an appointment; but he may not circulate a petition or solicit endorsements, recommendations, or support for the appointment of another person to such a position, whether such other person is a fellow employee or one not at the time in the Government service.

28. **Candidacy for public office.**—Candidacy for nomination or for election to a National, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy.

The Attorney General held in an opinion to the Secretary of the Interior dated April 17, 1940 (39 Op. Atty. Gen. 423), that the Hatch Act does not apply to the acceptance and holding of a local office to which an employee was elected without being a candidate, his name not appearing on the ballot but being written in by voters. However, the Commission interprets this opinion as applicable only in cases where the writing in of an employee's name is a spontaneous action on the part of the voters and does not come about as a result of pre-

arrangement whereby the employee was in effect a candidate before the vote was cast.

This decision is authority for the statement that the mere holding of a public office is not in itself a violation. (See also Attorney General's Circular No. 3301, October 26, 1939.)

However, it should be noted that membership on a political committee is not a public office, within the meaning of the foregoing, even though held by election in the regular election as a political representative of a ward, precinct, county, or of the voting subdivision of a State. The holding of such political offices is prohibited.

V. ACTIVITIES MADE PERMISSIBLE BY THE DIRECT TERMS OF THE HATCH ACT AS AMENDED

29. **Nonpartisan local elections—Elections involving general questions.**—By the terms of section 18 of the Hatch Act as amended July 19, 1940 (54 Stat. 767), certain specific exceptions to the general prohibition against taking any active part in political management or in political campaigns are set forth. Section 18 reads as follows:

> Nothing in the second sentence of section 9 (a) or in the second sentence of section 12 (a) of this Act shall be construed to prevent or prohibit any person subject to the provisions of this Act from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party.

The purport of section 18 is to remove from the prohibitions of the law activity which may, in a sense, be political but which is of a strictly local character, the issues of the election in question and the personalities of the candidates as such being divorced entirely from State and National political parties.

Each case necessarily must stand or fall on the facts involved therein. Some examples of the cases which have been decided under this section follow:

> The appointment of a person subject to the act or the rule to a position on a school board for the purpose of serving out the term of a member who has resigned is permissible where it can be shown that the duties do not involve any political activity.
>
> Officers or employees subject to the act or the rule may be candidates for a local fire board, on facts showing that the positions are of a purely local nature and nonpolitical, not involving a partisan election, and held without compensation.

In the case of a proposed charter amendment to permit municipal regulation of bus lines, it was decided that activities in connection with such a general question are such as would come within the terms of section 18 of the act.

In all such cases, however, the holding of the positions must not interfere with the efficient discharge of the duties of the Federal office and of this question the head of the Federal employing department is the sole judge.

30. **Communities adjacent to the District of Columbia or communities the majority of whose voters are employees of the Federal Government.**—For many years permission had been granted to employees residing in certain municipalities located near the District of Columbia whereby such employees were permitted to be candidates for and to hold local office in the municipalities in which they resided. This permission, which was granted either by an individual Executive order or by the action of the Commission based on an Executive order, remained in full force and effect until the passage of the act of August 2, 1939, which prohibited active participation in political management or in political campaigns without exception. When this act was amended by the act of July 19, 1940, a new section was added (section 16, 54 Stat. 767) whereby the Commission was authorized to promulgate regulations extending the privilege of active participation in local political management and local political campaigns to Federal employees residing in any municipalities or other political subdivisions of the States of Maryland and Virginia in the immediate vicinity of the District of Columbia or in municipalities the majority of whose voters are employed by the Government of the United States. This section of the amended act reads as follows:

Whenever the United States Civil Service Commission determines that, by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this Act are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons.

The Commission has promulgated regulations governing the extension of the privileges set forth in the section quoted above and copies of these regulations are available upon request to the Commission's central office in Washington, D. C. Under these regulations it is necessary that a formal request be received from the representatives of the community involved and that the petitioners furnish certain specified information relative to their community and its elections. In all cases the final decision as to the extension of the privileges of section 16 to any individual municipality depends on

the municipality's meeting certain prerequisites which are set forth in the Commission's regulations.

The privileges allowed by section 16 have after full consideration been extended by formal action of the Commission to the following municipalities or political subdivisions:

In Maryland

Annapolis (minute of the Commission, May 16, 1941).
Bladensburg (minute of the Commission, April 20, 1942).
Brentwood (minute of the Commission, September 26, 1940).
Capitol Heights (minute of the Commission, November 12, 1940).
Cheverly (minute of the Commission, December 18, 1940).
Chevy Chase, sections 1 and 2 (minute of the Commission, March 4, 1941).
Chevy Chase, section 3 (minute of the Commission, October 8, 1940).
Chevy Chase, section 4 (minute of the Commission, October 2, 1940).
Martin's Additions 1, 2, 3, and 4 to Chevy Chase (minute of the Commission, February 13, 1941).
Chevy Chase View (minute of the Commission, February 26, 1941).
Cottage City (minute of the Commission, January 15, 1941).
District Heights (minute of the Commission, November 2, 1940).
Edmonston (minute of the Commission, October 24, 1940).
Fairmount Heights (minute of the Commission, October 24, 1940).
Garrett Park (minute of the Commission, October 2, 1940).
Glenarden (minute of the Commission, May 21, 1941).
Glen Echo (minute of the Commission, October 22, 1940).
Greenbelt (minute of the Commission, October 4, 1940).
Hyattsville (minute of the Commission, September 20, 1940).
Kensington (minute of the Commission, November 8, 1940).
Mount Rainier (minute of the Commission, November 22, 1940).
North Beach (minute of the Commission, September 20, 1940).
North Brentwood (minute of the Commission, May 6, 1941).
North Chevy Chase (minute of the Commission, July 22, 1942).
Northwest Park (minute of the Commission, February 17, 1943).
Riverdale (minute of the Commission, September 26, 1940).
Seat Pleasant (minute of the Commission, August 31, 1942).
Somerset (minute of the Commission, November 22, 1940).
Takoma Park (minute of the Commission, October 22, 1940).
University Park (minute of the Commission, January 18, 1941).
Washington Grove (minute of the Commission, April 5, 1941).

In Virginia

Alexandria (minute of the Commission, April 15, 1941).
Arlington County (minute of the Commission, September 9, 1940).
Clifton (minute of the Commission, July 14, 1941).
Falls Church (minute of the Commission, June 6, 1941).

The Commission's actions extending the privileges of active participation in local self-government of the above-listed communities

of Maryland and Virginia to resident Federal officers or employees are subject to the following restrictions:

(1) Federal officers and employees in the exercise of these privileges must not neglect their official duties and must not engage in nonlocal partisan political activities.

(2) Federal officers and employees must not run for local office as candidates representing a political party or become involved in political management in connection with the campaign of a party candidate for office.

(3) Federal officers and employees who are candidates for local elective office must run as independent candidates and must conduct their campaigns in a purely nonpartisan manner.

(4) Federal officers and employees elected or appointed to local offices requiring full-time service must resign their positions with the Federal Government. If elected or appointed to offices requiring only part-time service they may accept and hold the same without relinquishing their Federal employment provided the holding of such part-time office does not conflict or interfere with their duties as officers or employees of the Federal Government. The department or independent agency in which Federal officers or employees are employed is the sole judge of whether or not the holding of the local office conflicts or interferes with their official duties as officers or employees of the Federal Government.

(5) The permission granted by the Commission to any particular community may be suspended or withdrawn by the Commission when in its opinion the activities resulting therefrom are or may become detrimental to the public interest or inimical to the proper enforcement of the political-activity law and rules.

VI. FEDERAL OFFICERS OR EMPLOYEES HOLDING LOCAL OFFICE

31. **General statement.**—While the Hatch Act and the civil-service rule prohibit Federal employees from being candidates for local elective office except in the instances mentioned in section V, subsection 30 above, there also must be considered those instances in which a Federal officer or employee wishes to accept an *appointive* office under a State or local government or in which a State or local officeholder wishes to accept Federal employment and does not wish to relinquish his State or local office or position. In these latter instances the mere holding of the local office in the absence of facts showing partisan political activity would *not* constitute a violation of the Hatch Act; however, the terms of an Executive order which has been in effect since 1873 must be applied.

This order, which is dated January 17, 1873, generally prohibits persons holding Federal civil office by appointment from, at the same time, accepting or holding any office or position under the State, Territorial, or municipal government. There are certain specific exceptions to this general prohibition set forth in the original order and subsequent amending orders and it has been ruled that unless

a position or office is specifically listed as an exception, it must be viewed as within the prohibitions of the order of 1873 (25 Dec. Comp. Treas. 234). Also, there is in effect, during the period of the present national emergency, Executive Order No. 8516 of August 15, 1940, which suspends and makes inoperative the Executive order of January 17, 1873, insofar as the United States Civil Service Commission shall by regulation authorize appointments to positions directly concerned with the national defense. The Commission has by formal action under the authority of the Executive order of August 15, 1940, decided that the Executive order of January 17, 1873, is not to be applied to persons appointed *subsequent* to August 15, 1940, to positions declared by the Commission to be directly concerned with the national defense.

For further information relative to the Executive order of January 17, 1873, the Executive order of August 15, 1940, and other amending orders, see subsections 32 through 35. NOTE.—*These Executive orders are no longer effective insofar as they conflict with the political-activity restrictions of section 9 (a) of the Hatch Act and are not to be construed as permitting officers and employees in the executive branch of the Federal Government to become candidates for any elective office which is to be filled in an election involving candidates who are either directly or indirectly representing a political party.*

32. **Executive order of January 17, 1873.**—This order, which is in full force and effect as applied to Federal employees holding positions not directly concerned with the national defense and to persons appointed to the Federal service prior to August 15, 1940, reads as follows:

Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him or otherwise under the Constitution and laws of the United States while holding such Federal positions accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority:

And whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March, A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be taken to be and will be treated as a resignation by such

Federal officer of his commission or appointment in the service of the United States.

The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order and are excepted from its operation, and may be held by Federal officers.

The appointment of deputy marshals of the United States may be conferred upon sheriffs or deputy sheriffs. Any deputy postmasters, the emoluments of whose office do not exceed $600 per annum, are also excepted from the operation of this order and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmasters. Heads of departments and other officers of the Government who have the appointment of subordinate officers are required to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective departments or offices and as relates to the several persons holding appointments under them, respectively.

33. **Interpretation of the order of January 17, 1873.**—An Executive order of January 28, 1873, as amended by Executive order of August 27, 1933, is as follows:

Inquiries having been made from various quarters as to the application of the Executive order issued on the 17th of January relating to the holding of State or municipal offices by persons holding civil offices under the Federal Government, the President directs the following reply to be made:

It has been asked whether the order prohibits a Federal officer from holding also the office of an alderman or of a common councilman in a city, or of a town councilman of a town or village, or of appointments under city, town, or village governments. By some it has been suggested that there may be distinction made in case the office be with or without salary or compensation. The city or town offices of the description referred to, by whatever names they may be locally known, whether held by election or by appointment, and whether with or without salary or compensation, are of the class which the Executive order intends not to be held by persons holding Federal offices.

It has been asked whether the order prohibits Federal officers from holding positions on boards of education, school committees, public libraries, religious or eleemosynary institutions incorporated or established or sustained by State or municipal authority. Positions and service on such boards and committees, and professorships in colleges* are not regarded as "offices" within the contemplation of the Executive order, but as employments or service in which all good citizens may be engaged without incompatibility and in many cases without necessary interference with any position which they may hold under the Federal Government. Officers of the Federal Government may therefore engage in such service, provided the attention required by such employment does not interfere with the regular and efficient discharge of the duties of their office under the Federal Government. The head of the department under whom the Federal office is held will in all cases be the sole judge whether or not the employment does thus interfere.

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* Includes assistant professorships in a State college, assistant lectureships in an evening school of a municipal university, instructorships in a State college, and similar positions in State and municipal colleges and universities (minute of Commission, August 7, 1937).

The question has also been asked with regard to officers of the State militia. Congress having exercised the power conferred by the Constitution to provide for organizing the militia, which is liable to be called forth to be employed in the service of the United States, and is thus, in some sense, under the control of the General Government, and is, moreover, of the greatest value to the public, the Executive order of the 17th January is not considered as prohibiting Federal officers from being officers in the militia in the States and Territories.

It has been asked whether the order prohibits persons holding office under the Federal Government being members of local or municipal fire departments, also whether it applies to mechanics employed by the day in the armories, arsenals, and navy yards, etc., of the United States. Unpaid service in local or municipal fire departments is not regarded as an office within the intent of the Executive order, and may be performed by Federal officers, provided it does not interfere with the regular and efficient discharge of the duties of the Federal office, of which the head of the department under which the office is held will in each case be the judge.

Mechanics and laborers employed by the day in armories, arsenals, navy yards, etc., and master workmen and others who hold appointments from the Government or from any department, whether for a fixed time or at the pleasure of the appointing power, are embraced within the operation of the order.

34. **Executive order of August 15, 1940.**—This order, which suspends the prohibitions of the Executive order of January 17, 1873, as applied to certain national-defense appointments and appointees, reads as follows:

By virtue of and pursuant to the authority vested in me by section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631) and as President of the United States, it is ordered that the Executive Order of January 17, 1873, as amended, prohibiting, with certain exceptions, Federal officers and employees from holding State, territorial and municipal offices, be, and it is hereby, suspended and made inoperative in so far as the United States Civil Service Commission, shall, by regulation, authorize appointments to positions directly concerned with national defense.

The Commission has promulgated the following regulations to govern the application of the above-quoted Executive order:

1. August 15, 1940, shall be considered as the effective date for application of Executive Order 8516 and therefore the prohibitions of the Executive order of January 17, 1873, shall not be applied to persons appointed subsequent to August 15, 1940, to positions directly concerned with the national defense.

2. Executive Order 8516 shall apply with equal force and effect to Federal officers or employees appointed subsequent to August 15, 1940, to State or local positions directly connected with national defense and to State or local officers or employees appointed subsequent to August 15, 1940, to Federal positions directly connected with national defense.

3. (a) All Federal positions, appointments to which are governed by the War Service Regulations, shall be considered positions directly connected with national defense.

(b) The applicability of Executive Order 8516 to State or local positions will be determined by the facts in each particular case.

4. Nothing in these regulations, nor in Executive Order 8516, shall be construed to permit the holding of a State or local position by a Federal officer or employee or the holding of a Federal position by an officer or employee of a State or local government, when such holding is prohibited by the rules or regulations of the department or agency wherein said officer or employee is employed, or when the duties of the State or local position will conflict or interfere with the individual's official duties as a Federal employee, provided that the employing department or agency will be considered as the sole judge in determining these factors.

5. The terms of Executive Order 8516 are subject to the general political activity restrictions of section 1 of Civil Service Rule I and the Hatch Act. Therefore the authority granted by the Executive order can in no way be construed as authorizing any person subject to such political activity restrictions to become a candidate for election or re-election to any public elective office which is to be filled in an election involving party candidates.

35. **Executive orders creating exceptions to the Executive order of January 17, 1873.**—Federal employees are again cautioned that the authority conferred by these orders is now subject to the general restrictions of the Hatch Act. Thus, these orders do *not* authorize Federal employees to be candidates for *any* elective office which is to be filled in an election involving party candidates for public office.

A brief summarization of these orders is as follows:

Employees of the Department of Agriculture.—Officers and employees of the Department of Agriculture are authorized to hold State and Territorial positions when such action is deemed necessary by the Secretary of Agriculture to secure a more efficient administration (Executive order of June 26, 1907).

Collectors of cotton statistics, Bureau of the Census.—State and county officials may be appointed special agents under the Bureau of the Census for the collection of cotton statistics (Executive order of August 4, 1909).

Moderators of town meetings.—The temporary office of moderator of a town meeting and offices of a like character are excepted from the operation of the order of January 17, 1873 (Executive order of August 24, 1912).

Employees of the Reclamation Service and the National Park Service.—Employees of the Reclamation Service and the National Park Service may, with the approval of the Secretary of the Interior, accept appointments as deputy State fish or game wardens, if no compensation is attached to the position (Executive order of July 9, 1914).

Lighthouse Service—Laborers.—Laborers in charge of lights in the Lighthouse Service are excepted from the operation of the order of January 17, 1873 (Executive order of October 6, 1915).[1]

Special agents, Department of Labor.—Persons holding State, Territorial, or municipal positions may be appointed as special agents when such action is deemed necessary by the Secretary of Labor to secure a more efficient administration of any law coming within the purview of the Department of Labor (Executive order of January 2, 1923).

Employees of the Veterans' Administration.—Officers and employees of the United States Veterans' Administration serving in a medical capacity and on a part-time basis may with the consent of the Administrator hold State, county, or

[1] The Lighthouse Service has been consolidated with the Coast Guard, Treasury Department.

municipal positions in which employed in a medical capacity. Officers and employees of the United States Veterans' Administration may with the consent of the Administrator accept appointments under State, county, or municipal authority as deputy sheriffs (Executive order of August 6, 1924).

Employees of the Alaska Railroad.—Employees of the Alaska Railroad, permanently residing in municipalities on the line of the railroad, are permitted to become candidates for and hold municipal office therein (Executive order of October 22, 1926).

Appointments in the Department of Commerce.—Persons holding State, Territorial, or municipal positions may receive, unless prohibited by law, appointments under the Department of Commerce when the Secretary of that Department deems such employment necessary to secure more efficient administration of the duties of his department (Executive order of July 3, 1931).

Officers of the Public Health Service.—Officers of the Public Health Service are permitted, upon recommendation of the Surgeon General of the Public Health Service, and the approval of the Secretary of the Treasury, to hold office in State, Territorial, or local health organizations, in order to cooperate with and aid State, Territorial, or local health departments; and State, Territorial, or local health officials or employees are permitted, unless prohibited by law, to hold office in the Public Health Service when the Surgeon General and the Secretary of the Treasury deem such employment necessary to secure a more efficient administration of the duties imposed upon the Public Health Service (Executive order of August 31, 1931).

Offices under municipalities of the Virgin Islands.—Membership in the Colonial Council of the Municipality of St. Thomas and St. John, or in the Colonial Council of the Municipality of St. Croix, Virgin Islands, being unremunerative positions, shall not be deemed disqualification for employment in the Federal service of the Virgin Islands, notwithstanding the Executive order of January 17, 1873, provided it does not interfere with the efficient discharge of the duties of the Federal position of which the head of the department under which the position is held will be the judge (Executive order of February 27, 1933).

Employees of the National Park Service.—Employees of the National Park Service are permitted, with the approval of the Secretary of the Interior, to accept appointments as deputy sheriffs under the laws of the States or Territories in which such employees may be on duty: *Provided*, That their services as such deputy sheriffs shall be without compensation and shall not in any manner interfere or conflict with the performance of their duties as employees of the National Park Service (Executive order of April 3, 1936).

Medical officers, Indian Service.—Officers and employees of the Indian Service, Department of the Interior, serving in a medical or sanitary capacity, either on a part-time or full-time basis, may hold, with the consent of the Secretary of the Interior, State, county, or municipal positions of a similar character: *Provided*, That such services shall not in any manner interfere or conflict with the performance of their duties as officers or employees of the Indian Service: *And provided further*, That there shall be no additional compensation when the Federal officer or employee is carried on a full-time basis (Executive order of May 13, 1936).

District advisers in the Interior Department under the act of June 28, 1934.—State, county, or municipal officers, when duly elected by qualified voters of a grazing district, may be appointed by the Secretary of the Interior to serve as

district adviser under the act of June 28, 1934 (48 Stat. 1269), as amended by the act of July 14, 1939 (Public, No. 173, 76th Cong.), for intermittent duty, when the Secretary of the Interior deems such services necessary in the interest of grazing on public lands (Executive order of June 17, 1937).

Immigration inspector, Department of Labor, Virgin Islands.—Officers and employees of the Municipalities of St. Thomas and St. John or of the Municipality of St. Croix, Virgin Islands, may be appointed to the position of immigration inspector for the Virgin Islands (Executive order of November 6, 1937).

Employees of the Interior Department.—Officers and employees of the Interior Department, upon approval of the Secretary of the Interior, may hold office under State, Territorial, and municipal governments engaged in cooperative and related work with the Department, provided that the services to be performed pertain to such work and do not interfere with the performance of the Federal duties. State, Territorial, and municipal employees engaged in cooperative and related work with the Interior Department may be appointed in the Department of the Interior when the Secretary deems such employment necessary to secure more efficient administration of said work. Appointments of such officers and employees to positions subject to the civil-service laws must be made in accordance with such laws (Executive order of January 21, 1938).

Employees of the United States Marshal for the Virgin Islands.—Any officer or employee of the police or prison departments of the Territorial and municipal governments of the Virgin Islands may be appointed to the position of deputy or any other position in the office of the United States Marshal for the Virgin Islands (Executive order of May 24, 1938).

Employees of the Division of Grazing, Department of the Interior.—Employees of the Division of Grazing of the Department of the Interior, with the approval of the Secretary, may accept appointment as deputy fire warden, deputy fish warden, or deputy game warden under the States in which such employees may be on duty, provided that their services in the State position are without compensation and do not interfere with the performance of the duties of the Federal position (Executive order of August 4, 1938).

School teachers and instructors.—Officers and employees of the Federal Government may hold positions as teachers or instructors in any State, Territorial, or municipal school or university, provided that their holding of such position shall not in any manner interfere or conflict with the performance of their duties during their regular hours of duty as officers or employees of the Federal Government (Executive order of April 11, 1940).

Utilization of services of State and local officers.—The heads of a number of Federal agencies are authorized by specific statutes to employ the services of State and local officers.

Employees residing in municipalities near the District of Columbia.—Special permission has been granted to employees residing in municipalities near the District of Columbia to hold local municipal office by the Executive order of February 14, 1912. However, the scope of such permission was restricted by the act of August 2, 1939, which prohibited active participation in political management or in political campaigns. When this act was amended July 19, 1940, provision was made for the reextension of these privileges. (See section 30, pages 16 through 18.)

VII. STATUTES RELATING TO POLITICAL ASSESSMENTS, POLITICAL COERCION AND DISCRIMINATION, AND THE PURCHASE AND SALE OF PUBLIC OFFICE

36. In addition to the restrictions of the act of August 2, 1939 (as amended), civil-service rules, Executive orders, and departmental regulations, the freedom of officers and employees of the executive civil service to engage in politics is limited further by a number of statutes. These statutes are generally applicable to all officers and employees of the United States, whether or not in the classified service, and, in some cases, the language of the statute is sufficiently broad to include any person receiving compensation for services from money derived from the Treasury of the United States, and other persons. These statutes are set forth in the following sections. Some of the activities prohibited under penalty of fine and imprisonment are:

1. Solicitation or receipt of political contributions by one officer or employee from another.
2. The giving or handing over of a political contribution by one employee to another.
3. Solicitation or receipt of political contributions in a Federal building by any person, whether or not an employee of the Government.
4. Solicitation or receipt by any person of political contributions from any person receiving any benefit under any act of Congress appropriating funds for relief.
5. Solicitation or receipt of any thing of value, either for personal reward or as a political contribution, in return for the promise to use, or the use of, influence to secure an appointive office under the United States.
6. Payment or the offer of payment for the use of influence in securing an appointive office under the United States.
7. Promising employment, compensation, or other benefit made possible by act of Congress as consideration or reward for political activity.
8. Discrimination by an officer or employee in favor of, or against, another officer or employee on account of political contributions.
9. Depriving any person on account of race, creed, color, or political activity, of compensation or other benefit made possible by any act of Congress appropriating funds for relief.
10. Disclosure for political purposes of any list or names of persons receiving benefits under an act of Congress appropriating funds for relief and the receipt of such a list or names for political purposes.

VIII. POLITICAL ASSESSMENTS

37. **Solicitation or receipt of political contributions from Federal employees.**—The United States Code, title 18, section 208 (Criminal Code sec. 118, as amended), provides as follows:

It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or em-

ployee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Section 5 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61d), reads as follows:

"It shall be unlawful for any person to solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any person known by him to be entitled to or receiving compensation, employment, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes."

38. **Circulars of solicitation bearing names of Federal employees.**—In an opinion of October 17, 1902 (24 Op. 133), the Attorney General held that the sending of a circular letter by a political committee to Federal officers and employees soliciting financial aid in Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil Service Act (now sec. 118 of the Criminal Code), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee of the United States. The statute unquestionably condemns all such circulars, notwithstanding the particular form of words adopted, in order to show a request rather than a demand, and to give the responses a quasi-voluntary character.

39. **"Political assessments" defined.**—The following is an extract from the decision in *United States* v. *Scott* (74 Fed., 213), in the Circuit Court of the District of Kentucky, rendered October 7, 1895, by Taft, J.:

To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words "for a political purpose" may reasonably be construed to qualify not only the contribution but the solicitation. Similarly, to charge that a man received from another his contribution for a political purpose, by implication charges that the reception was for the same purpose as the contribution. * * * Nor was it necessary to set out the specific averment that the defendant knew that the persons from whom the contributions were received were officers of the United States.

The following extract is from the decision rendered by McCall, J., in the case of *United States* v. *Dutro, L. W.*, 1913, Western District of Tennessee (unreported):

The statute under which the indictment was found prohibits (and I shall speak of this concrete case) the postmaster at Memphis, Tenn., from receiving,

[*] Under section 8 of the act penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

or being in any manner concerned in receiving, any assessment, subscription, or contribution for any political purpose whatever from any official, clerk, or employee of the United States.

There are four counts in the indictment. Two of them charge the defendant with receiving subscriptions and contributions for political purposes from an officer, clerk, or employee of the United States, and two of them charge defendant with being concerned in receiving such assessment or subscription for political purposes from a clerk or employee of the United States.

Evidently one of the purposes of Congress in enacting the legislation was to prohibit superior officers from bringing pressure to bear upon their subordinates in order to secure contributions for campaign purposes, and the act is couched in very broad terms.

This evidence (which so far is uncontradicted) shows that the defendant, Mr. Dutro, did receive two contributions for campaign purposes from an officer or clerk or employee of the United States. Whatever may have been Mr. Dutro's frame of mind in regard to his connection with it, the one fact remains, as the evidence shows, that he received these contributions for the purposes and from the parties which the law prohibits. Perhaps and no doubt he did so without any thought that he was violating any statute, and felt that he was acting purely as a conveyor of these contributions to the political parties for whom they were intended, to accommodate those who were making the contributions, and purely as a personal matter; but I think under the evidence his action was in violation of the statute.

The other two counts, as I have pointed out, charge the defendant with being concerned in receiving assessments, subscriptions, or contributions for campaign purposes from a clerk, employee, or officer of the United States. There is a controversy here between counsel as to what the word "concerned" means. From what the law books say which have been read here, and from my own impression, it seems that the word "concerned" means to be interested in, or take part in, receiving such contributions. If Mr. Dutro, by his connection with these two subscriptions, took a part in the contributions being made by employees of the Government for campaign purposes, he would be guilty. I think the natural construction of the phrase or term or word necessarily leads to the conclusion that he did take a part in receiving the contributions, because he received and conveyed them from the contributors to the parties for whom they were intended, and, as the proof so far shows, he knew that the parties who were making the contributions were clerks under him in the Post Office Department, and he knew the purpose for which the money was to be used and where it was to go.

The foregoing case definitely establishes the principle that an employee of the Government who receives a political contribution from another such employee as a mere agent or messenger for the purpose of turning it over to a political organization commits a violation of the statute.

40. **Solicitation or receipt of political contribution in Federal buildings.**—The United States Code, title 18, section 209 (Criminal Code, sec. 119), provides that—

No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208

of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

41. **Letters addressed to Federal buildings.**—The Commission by a minute of March 23, 1897, held that addressing a letter to a Government employee in a Government building soliciting political contributions is a solicitation in that building within the meaning of section 12 of the Civil Service Act, but notwithstanding numerous violations no opportunity arose of having the question judicially determined until 1907, when an indictment was obtained against Edward S. Thayer at Dallas, Texas. A demurrer to the indictment was sustained on the ground that the act required the personal presence in the Government building of the solicitor. Appeal was taken to the Supreme Court, and the judgment of the lower court was reversed. (*United States* v. *Thayer*, 209 U. S. 39.) The opinion of the Court, delivered by Justice Holmes on March 9, 1908, establishes definitely the proposition that solicitation by letter or circular addressed to and delivered by mail or otherwise to an officer or employee of the United States at the office or building in which he is employed in the discharge of his official duties is a solicitation "in a room or building" within the meaning of this section, the solicitation taking place where the letter was received. (See also *United States* v. *Smith*, 163 Fed., 926, where the letter was personally delivered.)

42. **Letters delivered in Federal buildings.**—The Commission holds that the sending through the mails of letters to Government employees soliciting political contributions, their street or home address being omitted from the envelopes, with the result that the letters are delivered by the postal authorities in the Government building in which they are employed, constitutes a violation of this section. It is a maxim of the law that a person is presumed to intend the natural and probable consequences of his acts, and failure or omission to take measures to avoid delivery of such letters in a Government building will render the offender liable to prosecution.

43. **Discrimination on account of political contributions.**—The United States Code, title 18, section 210 (Criminal Code, sec. 120), provides as follows:

> No officer or employee of the United States mentioned in section 208 of this title shall discharge or promote or degrade or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

(See also sec. 52 herein.)

44. **Payment of political contributions by one employee to another.**—The United States Code, title 18, section 211 (Criminal Code, sec. 121), provides as follows:

> No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate

to Congress or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

45. **Penalties for assessments.**—The United States Code, title 18, section 212 (Criminal Code, sec. 122), provides that—

Whoever shall violate any provision of sections 208 to 211 of this title shall be fined not more than $5,000 or imprisoned not more than 3 years, or both.

46. **Foregoing offenses declared felonies.**—By section 15 of the Civil Service Act it was declared that persons violating any provisions of the four preceding sections should be guilty of a misdemeanor, but this section is now superseded by section 122 of the Criminal Code, above quoted, which makes such violation a felony in view of the following provision of section 335 of the Criminal Code (U. S. C., title 18, sec. 541):

All offenses which may be punished by death or imprisonment for a term exceeding 1 year shall be deemed felonies. All other offenses shall be deemed misdemeanors.

IX. PURCHASE AND SALE OF PUBLIC OFFICE

47. **Payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 149, provides as follows:

It shall be unlawful to pay or offer or promise to pay any sum of money, or any other thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence, whatsoever, to procure any appointive office under the Government of the United States for any person whatsoever.

48. **Receiving payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 150, provides as follows:

It shall be unlawful to solicit or receive from anyone, whatsoever, either as a political contribution, or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the promise of support, or use of influence, or for the support or influence of the payee, in behalf of the person paying the money, or any other person, in obtaining any appointive office under the Government of the United States.

49. **Punishment for violation.**—The United States Code, title 18, section 151, provides:

Anyone convicted of violating sections 149 and 150 of this title shall be punished by imprisonment of not more than 1 year, or by a fine of not more than $1,000, or by both such fine and imprisonment.

50. **Promising benefits for political activity.**—Section 3 of the act of August 2, 1939, 53 Stat. 1147 (U. S. Code, title 18, section 61b), reads:

It shall be unlawful for any person, directly or indirectly to promise any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any act of Congress, to any person as

consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election.'

X. POLITICAL COERCION

51. Section 2, clause second, of the Civil Service Act directs that the civil-service rules "shall provide and declare as nearly as the conditions of good administration will warrant, as follows: * * * Sixth. That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." In pursuance of this section, civil-service rule I, section 1, provides, in part, that "No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof." This provision applies to all persons in the executive civil service, nonclassified as well as classified, and is held to prohibit a superior officer from requesting or requiring the rendition of any political service or the performance of political work of any sort by subordinates.

Section 1 of the act of August 2, 1939, 53 Stat. 1147 (U. S. Code, title 18, section 61), reads as follows:

That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions.'

Section 7 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61f), reads:

No part of any appropriation made by any act, heretofore or hereafter enacted, making appropriations for work relief, relief, or otherwise to increase employment by providing loans and grants for public-works projects, shall be used for the purpose of, and no authority conferred by any such act upon any person shall be exercised or administered for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.'

XI. POLITICAL DISCRIMINATION

52. **Failure to contribute or render political service not prejudicial.**—Section 2, clause second, of the Civil Service Act reads:

' Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

Fifth. That no person in the public service is for that reason under any obligations to contribute to any political fund or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Section 4 of the act of August 2, 1939, 53 Stat. 1147 (U. S. Code, title 18, section 61c), reads as follows:

It shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election.[10]

53. **No disclosure as to opinions or affiliations.**—Section 2 of rule I provides as follows:

No disclosure or discriminations.—No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law.

54. **Definition of discrimination.**—Political discrimination consists in giving appointment, promotion, or any other favor to an appointee, eligible, or candidate because of his politics, or withholding appointment, promotion, or any other favor from an appointee, eligible, or candidate because of his politics. An appointing officer who appoints or refuses to appoint an applicant because the applicant does or does not entertain certain political opinions, who makes any inquiry of the applicant or any other person as to the applicant's political opinions or affiliations, or reduces an employee because that employee refuses to render political service, to be coerced in political action, or to contribute money for political purposes, or who advances or promotes an employee for opposite reasons, violates the Civil Service Act and rules.

XII. POLITICAL RECOMMENDATION

55. **Senators and Representatives.**—Section 10 of the Civil Service Act provides:

That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or Member of the House of Representatives, except as to the character or residence of the

[10] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

applicant, shall be received or considered by any person concerned in making any examination or appointment under this act."

56. **Disclosing politics.**—Rule I, section 3, provides as follows:

No recommendation of an applicant, eligible, or employee in the classified service involving disclosure of his political or religious opinions or affiliations shall be considered or filed by the Civil Service Commission * * * or by any officer concerned in making appointments or promotions.

57. **Letters disclosing politics not to be considered.**—It is the duty of officers concerned in making appointments or promotions to refuse to receive or consider letters disclosing the politics or religion of an applicant, eligible, or employee and to explain to the writers that communications based upon such grounds will not receive attention or be filed.

58. **Recommendation for promotion.**—Rule XI, section 3, provides that—

No recommendation for promotion except in the regular form of periodical service-rating reports or unless it be made by the person or persons under whose supervision such employee has served shall be considered by any officer concerned in making promotions. Recommendation in any other form or by any other person, if made with the knowledge and consent of the employee, shall be sufficient cause for debarring him from the promotion proposed, and a repetition of the offense shall be sufficient cause for removing him from the service.

59. **Disclosure of names for political purposes.**—Section 6 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61e), reads:

It shall be unlawful for any person for political purposes to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment, or benefits provided for or made possible by any act of Congress appropriating, or authorizing the appropriation of, funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes."

" The penalty for violation of this section is a fine of not more than $1,000, imprisonment for not more than 1 year, or both.

[fol. 117] EXHIBIT "C" TO AFFIDAVIT

United States Civil Service Commission

Political Activity and Political Assessments
Of Federal Officeholders and Employees

[fol. 118] Contents

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[fol. 120] Political Activity and Political Assessments of Federal Officeholders and Employees

I. General Prohibitions

1. Civil-service rule I and the act of August 2, 1939.—Civil-service rule I, section 1, reads as follows:

No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.

The act of August 2, 1939, provides in part as follows:

It shall be unlawful for any person employed in any administrative position by the United States, or by any department, independent agency, or other agency of the United States (including any corporation controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof), to use his official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the Office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions (sec. 2, Public, No. 252, 76th Cong.).[1]

It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects. For the purposes

[1] Penalty for violation of this section is a fine of not more than $1,000 or imprisonment for not more than 1 year, or both (sec. 8, Public, No. 252, 76th Cong., Aug. 2, 1939).

of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by [fol. 121] any act of Congress for such position or office shall be used to pay the compensation of such person (sec. 9 (a) and (b), Public, No. 252, 76th Cong.).

The rule and the statute quoted above are general prohibition against participation in politics by officers and employees of the Government. All officers and employees of the Government are, in addition, subject to a number of statutes relating to solicitation of political contributions, political coercion, political discrimination, and the purchase and sale of public office, which are set forth in sections 36 to 59 of this publication.

Every Government employee is expected to be familiar with the statutes and the rule relating to political activity; ignorance does not excuse their violation. Each appointee to the classified service on entering on duty is required to sign a statement that he will familiarize himself with the rule and the laws relating to political activity.

2. Definition of political activity.—It is impossible to give a complete list of the particular activities in which an employee may not engage. The prohibition against political activity extends not only to national politics, but also to State, county, and municipal politics and to the activities of any political party by whatever designation it may be known. Any group of persons which opposes another group in matters of governmental principles or policies, or which contends for governmental power, is a political party. Since the scope of governmental activity is constantly changing, a question which is not a political issue at one time may assume a political aspect at another.

The merits of a particular cause or issue are immaterial. If politics is involved, active participation by employees of

the Government is prohibited. (See sec. 11.) An employee may participate in a discussion where no political issue is involved or make an address on any moral or ethical subject, but when two or more parties or factions become engaged in a contest for rival or antagonistic measures or policies of governmental control or regulation a political issue is created.

II. Applicability of the Rule and Statute

3. Classified employees.—Active participation in politics by employees in the competitive classified service is prohibited by civil-service rule I and also by the act of August 2, 1939, regardless of whether the classified status of such employees was acquired through competitive examination, classification by statute, or classification by Executive order. (See sec. 9.)

4. Excepted and nonclassified employees.—Only the first sentence of section 1, civil-service rule I, applies to employees in positions excepted from the competitive classified service. This sentence has been partially enacted in section 2 of the act of August 2, 1939 (see sec. 1 above), and violation of this provision of the statute constitutes a criminal offense.

Under section 9 (a) of the act of August 2, 1939 (see sec. 1 above), all persons employed in the executive branch of [fol. 122] the Federal Government [2] whether or not such persons are in the competitive classified service are prohibited from using their official authority or influence for the purpose of interfering with an election or affecting the result thereof; and from taking an active part in political management or in political campaigns. The statute, however, expressly reserves to Government employees the right to vote and the right to express their opinions on all political

[2] Except (a) the President and Vice President of the United States; (b) persons whose compensation is paid from the appropriation for the office of the President; (c) heads and assistant heads of executive departments; (d) officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

subjects. The effect of this section of the statute, therefore, is to place the same restrictions upon the political activities of all officers and employees of the executive branch of the Government, including Presidental appointees, as section 1 of civil-service rule I places upon the political activities of employees in the classified service, except that employees who are not in the competitive classified service may, according to a statement issued by the Attorney General, express their political opinions publicly, whereas classified employees are confined to a private expression of opinion. In expressing their political opinions publicly, however, nonclassified employees and excepted employees must not take part in an organized political campaign. Except for the manner in which non-classified employees are permitted to express their political opinions, there is no distinction between employees who are in the classified service and employees who are not in the classified service with respect to the prohibition against political activity.

5. Temporary employees—employees furloughed or on leave.—The mere fact that an employee is a temporary or emergency employee or a substitute, or is on furlough or leave of absence, does not exempt him from the statute or the rule. So long as an employee's name is carried on the rolls, restrictions regarding political activity apply to him and he must refrain from their violation, even though he may not be on active duty.[3] It is not permissible for an employee to take leave of absence for the purpose of working for a political committee or organization or of becoming a candidate for an elective office with the understanding that he will resign his classified position if nominated or elected.

6. Rural carriers.—An Executive order of December 30, 1911, provides as follows:

Hereafter paragraphs (*a*) and (*b*) of section 1 of civil-service rule VII shall apply to the appointment of rural carriers, and three eligibles shall be certified by the Civil Service Commission.

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[3] An employee who resigns effective at the expiration of his accrued leave may engage in politics after his last day of active service (minute of Commission, Nov. 5, 1938).

In all cases selections shall be made with sole reference to merit and fitness and without regard to political considerations. No inquiry shall be made as to the political or religious opinions or affiliations of any eligible, and no recommendation in any way based thereon shall be received, considered, or filed by any officer concerned in making selections or appointments. Any such recommendation, in writing, forwarded to any such officer shall be at once re- [fol. 123] turned to the writer, with attention invited to the purport of this order, and attention hereto shall be similarly directed in connection with any verbal recommendation. Where it is found that there has been a violation of these provisions by any officer concerned in making selections or appointments, such fact shall be cause for the immediate removal of such officer from the service, and the Commission shall make prompt report of any such case for appropriate action to the Postmaster General, or, as to Presidental appointees, to the President. The appointment of the rural carrier concerned, if effected, shall be canceled.

Persons employed as rural carriers, while retaining the right to vote as they please and to express their opinion privately on all political subjects, shall take no active part in political management or in political campaigns. Any rural carrier taking such part shall be removed from the service or otherwise disciplined, recommendation as to the penalty to be imposed in each case to be made by the Civil Service Commission.

Note.—Paragraphs (*a*) and (*b*) of section 1 of civil-service rule VII refer to the certification and appointment of eligibles.

7. Substitute rural carriers.—The restrictions regarding political activity are not applicable to substitute rural carriers, when they are not engaged upon substitute duties, to the same degree as to regular employees. While serving his route, however, a substitute is subject to the same discipline as a regular employee and must refrain from political activity. He must not use his position for political purposes, acting either independently or in collusion with the regular carrier.

8. Fourth-class postmasters.—The following is an extract from regulations approved by the President November 25, 1912:

In all cases selection for appointment shall be made with sole reference to merit and fitness and without regard to political or religious considerations. No inquiry shall be made as to the political or religious opinions or affiliations of any applicant or eligible, and in conformity with section 10 of the Civil Service Act no recommendation in any way based thereon shall be received or considered by any officer concerned in making selections or appointments. The attention of the writer of any such recommendation shall be invited to the purport of this order, and attention hereto shall be similarly directed in connection with any verbal recommendation. Where it is found that there has been a violation of these provisions by any officer concerned in making selections or appointments, such fact shall be cause for the immediate removal of such officer from the service, and the Civil Service Commission shall make prompt report of any such case for appropriate action to the Postmaster General, or, as to Presidential appointees to the President. The appointment of the fourth-class postmaster concerned, if effected, shall be canceled. Persons employed as postmasters of the fourth class, while retaining the right to vote as they please and to express their opinions privately on all political subjects, shall take no active part in political management or in political campaigns. Any such postmaster taking such part shall be removed from the service or otherwise disciplined, recommendations as to the penalty to be imposed in each case to be made by the Civil Service Commission. This section shall apply to all offices of the fourth class of whatever compensation.

9. Postmasterships at the first-, second-, and third-class offices.—Postmaster positions at the first-, second-, and third-class offices were included in the competitive classified serv- [fol. 124] ice by the act of June 25, 1938 (52 Stat. 1076), and the political activities of such postmasters are therefore subject to the same restrictions as those of classified officers and employees.

10. Retired employees.—Persons retired from the civil service are not regarded as employees of the Government and are not, therefore, subject to the restrictions of the civil-service rules. Such persons may engage in politics to the same extent as persons not connected with the Government service.

III. Particular Types of Prohibited Activities

11. As has been pointed out, it is impossible to make a complete enumeration of all the particular types of political activities in which Government employees may not engage. The general scope of the political-activity rule has been defined in section 2 above. In the following sections some of the types of political activity which occur more frequently are discussed in detail.

12. Activity by indirection.—Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are therefore accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

This does not mean that an employee's husband or wife may not engage in politics independently, upon his or her own initiative, and in his or her own behalf. Cases have arisen, however, in which the facts showed that the real purpose of a wife's activity was to accomplish a political act prohibited to her husband, the attempt being made for her husband's benefit and at his instigation or even upon his coercion. This may be true of individuals or it may occur among groups of employees' wives, associated for the purpose of securing for their husbands what their husbands may not secure for themselves. In such situations, it is obvious that the prohibitions against political activity are being indirectly violated. The collusion or coercion renders the wife's activity imputable to the husband, he being guilty of the same infraction as if he were openly a participant.

13. Conventions.—Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance merely as a spectator is permissible, but the employee so attending must not take any part in the convention or in the

deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obstrusive demonstration or interference. (See secs. 4 and 19.)

14. Primaries—caucuses.—An employee may attend a primary meeting, mass convention, beat convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass this point in participating in [fol. 125] its deliberations. He may not act as an officer of the meeting, convention, or caucus, may not address it, make motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

15. Committees.—Service on or for any political committee or similar organization is prohibited. An employee may attend as a spectator any meeting of a political committee to which the general public is admitted, but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether a classified employee may properly serve as a member. Assignment may be to duties which, if considered alone, would seem far removed from active politics, but which, when considered as a part of the whole purpose, assume an active political character. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

16. Clubs and organizations.—Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club, or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances. (See secs. 4 and 19.)

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Section 9A of the act of August 2, 1939 (Public, No. 252, 76th Cong.), provides as follows:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropri- [fol. 126] ated by any act of Congress for such position or office shall be used to pay the compensation of such person.

17. Contributions.—An employee may make political contributions to any committee, organization, or person not employed by the United States, but may not solicit, collect, receive, or otherwise handle or disburse the contributions. (See provisions of the Criminal Code, discussed in secs. 36 to 50.)

18. Meetings.—Service in preparing for, organizing, or conducting a political meeting or rally, addressing such a meeting, or taking any part therein, except as a spectator, is prohibited.

19. Expression of opinions.—Although section 9 (a) of the act of August 2, 1939, reserves to Federal officers and employees the right to express their opinions on all political subjects, officers and employees in the competitive classified service are subject also to section 1 of civil-service rule I, under which such employees must confine themselves to a *private* expression of opinion. Nonclassified and excepted employees may not indulge in such public expression of opinion as constitutes taking part in an organized political campaign. (See foregoing secs. 1 and 4.)

20. Activity at the polls and for candidates.—An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 2, sec. 250.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a national character. It is also a criminal offense to promise any employment, position, work or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party. (See secs. 48 and 50 herein.)

It is the duty of an employee to avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, assisting in counting the vote, or engaging in any other activity at the polls except the marking and depositing of his own ballot. Rendering service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of political activities pro-

hibited by the rule, even if such service is performed without regard to political party.

21. Election officers.—Service as judge of election, inspector, checker, teller, or as election officer of any kind is prohibited.

[fol. 127] 22. Newspapers—publication of letters or articles.—A classified employee may not publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use. (See secs. 4 and 19.)

23. Liquor question.—Activity in campaigns concerning the regulation or suppression of the liquor traffic is prohibited. An employee may be a member but not an officer of a club, league, or other organization which takes part in such a campaign. The dissemination of temperance propaganda is permissible, but any endeavor for or against the regulation, control, or suppression of the liquor traffic through political agencies is prohibited.

24. Betting or wagering on elections.—Betting or wagering upon the results of primary and general elections is penalized by the laws of most States and is improper political activity.

25. Activity in civic organizations and citizens' associations.—Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, or civil-service rule I, provided such activities have no connection with the campaigns of particular candidates or parties.

26. Parades.—An employee may not march in a political parade, organize, or be an officer or leader of such a parade.

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[4] Appointment is made by the President by and with the advice and consent of the Senate to postmaster positions of the first, second, and third classes, but these positions are in the competitive classified service under the act of June 25, 1938.

A government employee may not take part in the activities of a musical organization in any parade or other activity of a political party.

27. Signing petitions.—The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or Member thereof, shall not be denied or interfered with."

The right guaranteed by the Constitution and the statute extends only to petitions addressed to the Government, or to Congress or Members thereof. It does not extend to petitions addressed to State, county, or municipal governments, or to other political units. A classified employee is permitted to sign petitions of the latter class *as an individual*, without reference to his connection with the Government, but he may not initiate them, circulate them, or canvass for the signatures of others.

[fol. 128] 28. Applying for Presidential positions not in the classified service.[1]—When a classified employee seeks promotion by appointment or transfer to a Presidential office not in the classified service there is no objection to his becoming a candidate for such an office, provided the consent of his department is obtained, and provided he does not violate section 1 of rule I, prohibiting the use of his official authority or influence in political matters, and provided further that he does not neglect his duty and avoids any action that would cause public scandal or semblance of coercion of his fellow employees or of those over whom he desires to be placed in the position he seeks.

A classified employee may circulate a petition or seek endorsements for his own appointment to a Presidential position, subject to the qualifications above stated, and he may, as an individual, sign a petition or recommend an-

[1] See footnote on opposite page.

other person for such an appointment; but he may not circulate a petition or solicit endorsements, recommendations, or support for the appointment of another person to such a position, whether such other person is a fellow employee or one not at the time in the Government service.

When an unofficial primary or election is held for the purpose of determining the popular choice for the Presidential office, a classified employee may permit his name to appear upon the ticket, but he may not solicit votes in his behalf at such a primary or election, or in any manner violate section 1 of rule I. He may vote and express privately his opinions, but may not solicit votes or publicly advocate the candidacy or election of himself or any other person. Although it is permissible for a classified employee, *as an individual*, to sign a petition or recommend another person for appointment to a non-classified position, he is not permitted to sign such a petition as a Government employee or in any other way to use his official authority or influence to advance the candidacy of any person for election or appointment to any office. Classified employees are permitted to exercise the right as individuals to sign a petition favoring a candidate for any office, but they may not do so as Government employees or as a group or association of Government employees.

29. Other forms of political activity.—Among other forms of political activity which are prohibited are the distribution of campaign literature, badges or buttons, and assuming general political leadership or becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office.

IV. Candidacy For or Holding Local Office—Classified and Nonclassified Employees

30. Candidacy for local office.—Candidacy for a nomination or for election to any national, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy. The fact that candidacy is merely passive is immaterial; if an employee acquiesces in the efforts of

[fol. 129] friends in furtherance of such candidacy such acquiescence constitutes an infraction of the prohibitions against political activity.

31. Federal employees holding local office.[5]—Persons holding Federal civil office by appointment, whether in the competitive classified service or not, are prohibited from accepting or holding any office under a State, Territorial, or municipal government by an Executive order of January 17, 1873, which is as follows:

Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him or otherwise under the Constitution and laws of the United States while holding such Federal positions accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority:

And whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March, A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed

[5] See sec. 35.

a vacation of the Federal office held by such person, and will be taken to be and will be treated as a resignation by such Federal officer of his commission or appointment in the service of the United States.

The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order and are excepted from its operation, and may be held by Federal officers.

The appointment of deputy marshals of the United States may be conferred upon sheriffs or deputy sheriffs. Any deputy postmasters, the emoluments of whose office do not exceed $600 per annum, are also expected from the operation of this order and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmasters.[6] Heads of departments and other officers of the Government who have the appointment of subordinate officers are require to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective departments or offices and as relates to the several persons holding appointments under them, respectively.[7]

[fol. 130] 32. Interpretation of the order of January 17, 1873.—An Executive order of January 28, 1873, as amended by Executive order of August 27, 1933, is as follows:

Inquiries having been made from various quarters as to the application of the Executive order issued on the 17th of January relating to the holding of State or municipal offices by persons holding civil offices under the Federal Government, the President directs the following reply to be made:

It has been asked whether the order prohibits a Federal officer from holding also the office of an alderman or of a common councilman in a city, or of a town councilman of a town or village, or of appointments under city, town, or village governments. By some it has been suggested that

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[6] See sec. 8.

[7] A Federal employee who resigns at the expiration of his accrued leave may accept a State or municipal position after his last day of active Federal service (16 Comp. Gen. 776, Feb. 19, 1937).

there may be distinction made in case the office be with or without salary or compensation. The city or town offices of the description referred to, by whatever names they may be locally known, whether held by election or by appointment, and whether with or without salary or compensation, are of the class which the Executive order intends not to be held by persons holding Federal offices.

It has been asked whether the order prohibits Federal officers from holding positions on boards of education, school committees, public libraries, religious or eleemosynary institutions incorporated or established or sustained by State or municipal authority. Positions and service on such boards and committees, and professorships in colleges [8] are not regarded as "offices" within the contemplation of the Executive order, but as employments or service in which all good citizens may be engaged without incompatibility and in many cases without necessary interference with any position which they may hold under the Federal Government. Officers of the Federal Government may therefore engage in such service, provided the attention required by such employment does not interfere with the regular and efficient discharge of the duties of their office under the Federal Government. The head of the department under whom the Federal office is held will in all cases be the sole judge whether or not the employment does thus interfere.

The question has also been asked with regard to officers of the State militia. Congress having exercised the power conferred by the Constitution to provide for organizing the militia, which is liable to be called forth to be employed in the service of the United States, and is thus, in some sense, under the control of the General Government, and is, moreover, of the greatest value to the public, the Executive order of the 17th January is not considered as prohibiting Federal officers from being officers in the militia in the States and Territories.

It has been asked whether the order prohibits persons holding office under the Federal Government being members of local or municipal fire departments, also whether it

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[8] Includes assistant professorships in a State college, assistant lectureships in an evening school of a municipal university, instructorships in a State college, and similar positions in State and municipal colleges and universities (minute of Commission, August 7, 1937).

applies to mechanics employed by the day in the armories, arsenals, and navy yards, etc., of the United States. Unpaid service in local or municipal fire departments is not regarded as an office within the intent of the Executive order, and may be performed by Federal officers, provided it does not interfere with the regular and efficient discharge of the duties of the Federal office, of which the head of the department under which the office is held will in each case be the judge.

Mechanics and laborers employed by the day in armories, arsenals, navy yards, etc., and master workmen and others who hold appointments from the Government or from any department, whether for a fixed time or at the pleasure of [fol. 131] the appointing power, are embraced within the operation of the order.

33. Eligibles holding local office.—Eligibles who are holding a local office not excepted from the prohibitions of the order of January 17, 1873, on selection for and acceptance of any position in the competitive classified service or of unclassified laborer must immediately resign the local office. Such resignation must be effected whether the service in the local office is compensated or uncompensated or whether the employee is on active duty or leave without pay. The holding of a local office is not excepted from the prohibitions of the order of January 17, 1873, is an absolute disqualification for appointment, and unless persons otherwise eligible for appointment are willing immediately to resign the local office in the event of selection for appointment, their appointments cannot be approved.

34. Minor local offices which may be held by Government officers and employees.—Although the Executive orders of January 17 and January 28, 1873, prohibit generally any person holding Federal civil office by appointment, from accepting or holding an office under a State, Territorial, or municipal government, certain offices of a minor character are excepted from this general prohibition. Among these are positions of justice of the peace; notary public; commissioner to take acknowledgment of deeds, of bail, or to administer oaths; positions on boards of education, school committees, public libraries, and in religious or eleemosynary institutions. In addition, Federal employees are, under certain conditions, permitted to hold other local offices under authority of the Executive orders set forth in

section 35. The permission to hold local offices granted by these Executive orders, however, is now subject to the general prohibition of section 9 of the act of August 2, 1939 (see sec. 1), against participation in political management and in political campaigns by Federal employees.

In view of the broad language of section 9 of the act of August 2, 1939, the incumbency by a Federal employee of any *elective* office whatever under a State, Territorial, or municipal government is prohibited, regardless of whether or not the office is of such character that its incumbency was permitted by Executive order prior to the enactment of the act. The incumbency by a Federal employee of an appointive office under a State, Territorial, or municipal government is permissible, provided such incumbency is specifically authorized by some statute or Executive order. In securing such offices, however, and in the discharge of the duties thereof, Federal employees must not engage in political management.

35. Special exceptions to the order of January 17, 1873.—The following Executive orders contain special exceptions to the general prohibition of the Executive orders of January 17 and January 28, 1873. The authority conferred by these orders is now subject to the general restriction contained in the act of August 2, 1939, against participation in political management and in political campaigns. (See sec. 34, above.)

Employees on Indian reservations may be appointed under State authority as deputy sheriffs or constables, [fol. 132] the requirements of the service demand. The reason for this action is that on all reservations which have been allotted and opened for settlement conditions arise wherein the Federal Government has sole jurisdiction over certain offenses and the State has jurisdiction over other offenses, and if the joint authority of a Federal and State officer can be merged in one person, a serious difficulty in the administration of justice is removed.

There is no objection to the holding of a low-salaried position in a municipal fire department.

Under Executive orders certain other exceptions have been made, as indicated below:

Employees of the Department of Agriculture.—Officers and employees of the Department of Agriculture are authorized to hold State and Territorial positions when such

action is deemed necessary by the Secretary of Agriculture to secure a more efficient administration (Executive order of June 26, 1907).

Collectors of cotton statistics, Bureau of the Census.—State and county officials may be appointed special agents under the Bureau of the Census for the collection of cotton statistics (Executive order of August 4, 1909).

Moderators of town meetings.—The temporary office of moderator of a town meeting and offices of a like character are excepted from the operation of the order of January 17, 1873 (Executive order of August 24, 1912).

Employees of the Reclamation Service and the National Park Service.—Employees of the Reclamation Service and the National Park Service may, with the approval of the Secretary of the Interior, accept appointments as deputy State fish or game wardens, if no compensation is attached to the position (Executive order of July 9, 1914).

Lighthouse Service—Laborers.—Laborers in charge of lights in the Lighthouse Service are excepted from the operation of the order of January 17, 1873 (Executive order of October 6, 1915).[9]

Special agents, Department of Labor.—Persons holding State, Territorial, or municipal positions may be appointed as special agents when such action is deemed necessary by the Secretary of Labor to secure a more efficient administration of any law coming within the purview of the Department of Labor (Executive order of January 2, 1923).

Employees of the Veterans' Administration.—Officers and employees of the United States Veterans' Administration serving in a medical capacity and on a part-time basis may with the consent of the Administrator hold State, county, or municipal positions in which employed in a medical capacity. Officers and employees of the United States Veteran's Administration may with the consent of the Administrator accept appointments under State, county, or municipal authority as deputy sheriffs (Executive order of August 6, 1924).

Employees of the Alaska Railroad.—Employees of the Alaska Railroad, permanently residing in municipalities on the line of the railroad, are permitted to become candidates

[9] The Lighthouse Service has been consolidated with the Coast Guard, Treasury Department.

for and hold municipal office therein (Executive order of October 22, 1926).

Appointments in the Department of Commerce.—Persons holding State, Territorial, or municipal positions may receive, unless prohibited by law, appointments under the Department of Commerce when the Secretary of that Department deems such employment necessary to secure more efficient administration of the duties of his department (Executive order of July 3, 1931).

Officers of the Public Health Service.—Officers of the Public Health Service are permitted, upon recommendation of the Surgeon General of the Public Health Service, and the approval of the Secretary of the Treasury, to hold office in State, Territorial, or local health organizations, in order to cooperate with and aid State, Territorial, or local health departments; and State, Territorial, or local health officials or employees are permitted, unless prohibited by law, to hold office in the Public Health Service when the Surgeon General and the Secretary of the Treasury deem such employment necessary to secure a more efficient administration of the duties imposed upon the Public Health Service (Executive order of August 31, 1931).

[fol. 133] Offices under municipalities of the Virgin Islands.—Membership in the Colonial Council of the Municipality of St. Thomas and St. John, or in the Colonial Council of the Municipality of St. Croix, Virgin Islands, being unremunerative positions, shall not be deemed disqualification for employment in the Federal service of the Virgin Islands, notwithstanding the Executive order of January 17, 1873, provided it does not interfere with the efficient discharge of the duties of the Federal position, of which the head of the department under which the position is held will be the judge (Executive order of February 27, 1933).

Employees of the National Park Service.—Employees of the National Park Service are permitted, with the approval of the Secretary of the Interior, to accept appointments as deputy sheriffs under the laws of the States or Territories in which such employees may be on duty: *Provided*, That their services as such deputy sheriffs shall be without compensation and shall not in any manner interfere or conflict with the performance of their duties as employees of the National Park Service (Executive order of April 3, 1936).

Medical officers, Indian Service.—Officers and employees of the Indian Service, Department of the Interior, serving

in a medical or sanitary capacity, either on a part-time or full-time basis, may hold, with the consent of the Secretary of the Interior, State, county, or municipal positions of a similar character; *Provided*, That such services shall not in any manner interfere or conflict with the performance of their duties as officers or employees of the Indian Service: *And provided further*, That there shall be no additional compensation when the Federal office or employee is carried on a full-time basis (Executive order of May 13, 1936).

District advisers in the Interior Department under the act of June 28, 1934.—State, county, or municipal officers, when duly elected by qualified voters of a grazing district, may be appointed by the Secretary of the Interior to serve as district adviser under the act of June 28, 1934 (48 Stat. 1269), as amended by the act of July 14, 1939 (Public, No. 173, 76th Cong.), for intermittent duty, when the Secretary of the Interior deems such services necessary in the interest of grazing on public lands (Executive order of June 17, 1937).

Immigration inspector, Department of Labor, Virgin Islands.—Officers and employees of the Municipalities of St. Thomas and St. John or of the Municipality of St. Croix, Virgin Islands, may be appointed to the position of immigration inspector for the Virgin Islands (Executive order of November 6, 1937).

Employees of the Interior Department.—Officers and employees of the Interior Department, upon approval of the Secretary of the Interior, may hold office under State, Territorial, and municipal governments engaged in cooperative and related work with the Department, provided that the services to be performed pertain to such work and do not interfere with the performance of the Federal duties. State, Territorial, and municipal employees engaged in cooperative and related work with the Interior Department may be appointed in the Department of the Interior when the Secretary deems such employment necessary to secure more efficient administration of said work. Appointments of such officers and employees to positions subject to the civil-service laws must be made in accordance with such laws. (Executive order of January 21, 1938).

Employees of the United States Marshal for the Virgin Islands.—Any officer or employee of the police or prison departments of the Territorial and municipal governments of the Virgin Islands may be appointed to the position of

deputy or any other position in the office of the United States Marshal for the Virgin Islands (Executive order of May 24, 1938).

Employees of the Division of Grazing, Department of the Interior.—Employees of the Division of Grazing of the [fol. 134] Department of the Interior, with the approval of the Secretary, may accept appointment as deputy fire warden, deputy fish warden, or deputy game warden under the States in which such employees may be on duty, provided that their services in the State position are without compensation and do not interfere with the performance of the duties of the Federal position (Executive order of August 4, 1938).

Utilization of services of State and local officers.—The heads of a number of Federal agencies are authorized by specific statutes to employ the services of State and local officers.

Employees residing in municipalities near the District of Columbia.—Special permission has been granted to employees residing in municipalities near the District of Columbia to hold local municipal office by the Executive order of February 14, 1912, which is quoted in the paragraphs below. The scope of this permission has been restricted by the act of August 2, 1939, which prohibits participation in political management or political campaigns. The permission granted by the Executive order of February 14, 1912, must therefore be exercised subject to the provisions of the act of August 2, 1939. (See sec. 34 above.)

Employees of the executive civil service permanently residing in the following incorporated municipalities adjacent to the District of Columbia will not be prohibited from becoming candidates for or holding municipal office in such corporations:

In Maryland—Takoma Park, Kensington, Garrett Park, Chevy Chase, Glen Echo, Hyattsville, Mount Rainier, Somerset,[10] North Beach,[11] Capitol Heights,[12] Laurel,[13]

[10] Executive order, May 5, 1914.

[11] Executive order, May 26, 1914.

[12] Executive order, February 23, 1916.

[13] Executive order, March 9, 1918.

Riverdale,[14] Bladensburg,[15] Brentwood,[16] Berwyn Heights,[17] Cottage City,[18] North Brentwood,[19] Edmonston,[20] Colmar Manor,[21] Fairmount Heights,[22] Eagle Harbor,[23] Cobb Island,[24] Seat Pleasant,[25] Cheverly,[26] District Heights,[27] Greenbelt.[28]

In Virginia—Clifton Station,[29] Falls Church, Vienna, Herndon, Potomac.[30]

In the exercise of the privilege granted by this order, officers and employees must not neglect their official duties and must not engage in national, State, or county political activity in violation of the civil-service rules, and if there is such violation the head of the department or independent office in which the person is employed shall inflict such punishment as the Civil Service Commission shall recommend.

[fol. 135] The Civil Service Commission may extend the privilege of this order to other incorporated municipalities in Maryland and Virginia when it shall deem it necessary to the domestic interests of the Government employees resident therein.[31] (Executive order of February 14, 1912, as amended.)

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[14] Executive order, November 25, 1920.
[15] Executive order, April 29, 1922.
[16] Executive order, June 7, 1923.
[17] Executive order, May 19, 1924.
[18] Executive order, July 12, 1924.
[19] Minute of the Commission, July 18, 1924.
[20] Minute of the Commission, September 2, 1924.
[21] Minute of the Commission, June 6, 1927.
[22] Minute of the Commission, June 15, 1927.
[23] Minute of the Commission, August 6, 1929.
[24] Minute of the Commission, May 29, 1930.
[25] Minute of the Commission, July 17, 1931.
[26] Minute of the Commission, April 24, 1931.
[27] Minute of the Commission, May 18, 1936.
[28] Minute of the Commission, November 29, 1937.
[29] Minute of the Commission, December 21, 1937.
[30] As amended by Executive order, December 24, 1921. Potomac, Va., has been annexed to the city of Alexandria, Va., and the authority granted by the order is revoked.
[31] Executive order, July 12, 1924.

NOTE.—The exception made in this case to section 1 of rule I and the Executive order of January 17, 1873, does not extend to municipalities other than those specifically named.

Employees of navy yards, arsenals, and military establishments.—Special permission has been granted to employees of navy yards, arsenals, and military establishments to hold local and municipal office by the Executive order of May 14, 1909, as amended by Executive order of August 27, 1919, which is quoted in the following paragraph. The scope of this permission has been restricted by the act of August 2, 1939, which prohibits participation in political management or political campaigns. The permission granted by the Executive orders must therefore be exercised subject to the provisions of the act of August 2, 1939. (See section 34 above.)

Whenever in the opinion of the Secretary of the Navy or the Secretary of War a strict enforcement of the provisions of section 1, rule I, of the civil-service rules would influence the result of a local election the issue of which materially affects the local welfare of the Government employees in the vicinity of any navy yard or station or of any arsenal or other military establishment, the Civil Service Commission may, on recommendation of the Secretary of the Navy or the Secretary of War, and after such investigation as it may deem necessary, permit the active participation[32] of the employees of the yard, station, arsenal, or other military establishment in such local election. In the exercise of the privilege which may be conferred hereunder, persons affected must not neglect their official duties nor cause public scandal by their activity (Executive order of May 14, 1909, as amended by Executive order of August 27, 1919).

NOTE.—It is not the practice of the War and Navy Departments to recommend, or of the Commission to grant, under this order permission to bosses or head men, by whatever designation known, or to any person whose recommendations have, by regulation, any influence upon the employment, promotion, laying off, or discharge of other em-

[32] Participation in political management and in political campaigns is now prohibited by the act of August 2, 1939. (See sec. 34, above.)

ployees, to hold local office. Prior permission must be obtained to hold local office under the order. The order applies solely to local municipal offices. The order does not apply to localities where the proportion of Government employees to the total population is negligible.

Employees residing in Arlington County, Va.—Special permission has been granted to employees residing in Arlington County, Va., to hold local municipal office by the Executive order of May 20, 1931, which is quoted in the following paragraph. The scope of this permission has been restricted by the act of August 2, 1939, which prohibits participation in political management or political campaigns. The permission granted by the Executive order of May 20, 1931, must therefore be exercised subject to the provisions of the act of August 2, 1939. (See sec. 34 above.)

Officers and employees of the executive civil service permanently residing in Arlington County, Va., may become candidates for[32] and hold local office in such county and may participate in campaigns for election to such offices.[32]

In the exercise of the privilege granted by this order, officers and employees must not neglect their official duties and must not engage in National or State politics in viola- [fol. 136] tion of the civil-service rules.[32] If there is such violation, the head of the department or independent office in which the person is employed shall inflict such punishment as the Civil Service Commission shall recommend.

Officers and employees elected[32] or appointed to offices requiring full-time service shall resign their positions with the Federal Government. If elected[32] or appointed to offices requiring only part-time service, they may accept and hold same without relinquishing their Federal employment, provided the holding of such part-time office does not conflict or interfere with their official duties as officers or employees of the Federal Government.

This order is based upon the facts that Arlington County is substantially a municipality, that a considerable number of the residents and taxpayers are employed in the Govern-

[32] Participation in political management and in political campaigns is now prohibited by the act of August 2, 1939. (See sec. 34, above.)

ment service, that service as local officers in such county should in no way involve general partisan political activity[32] and that the principle of home rule and local self-government justifies such participation.

The permission granted by this order may be suspended or withdrawn by the Civil Service Commission when, in its opinion, the activities resulting therefrom are, or may become, detrimental to the public interest or inimical to the proper enforcement of the civil-service rules (Executive order of May 20, 1931).

V. Statutes Relating to Political Assessments, Political Coercion and Discrimination, and the Purchase and Sale of Public Office

36. In addition to the restrictions of the act of August 2, 1939, civil-service rules, Executive orders, and departmental regulations, the freedom of officers and employees of the executive civil service to engage in politics is limited further by a number of statutes. These statutes are generally applicable to all officers and employees of the United States, whether or not in the classified service, and, in some cases, the language of the statute is sufficiently broad to include any person receiving compensation for services from money derived from the Treasury of the United States, and other persons. These statutes are set forth in the following sections. Some of the activities prohibited under penalty of fine and imprisonment are:

1. Solicitation or receipt of political contributions by one officer or employee from another.

2. The giving or handing over of a political contribution by one employee to another.

3. Solicitation or receipt of political contributions in a Federal building by any person, whether or not an employee of the Government.

4. Solicitation or receipt by any person of political contributions from any person receiving any benefit under any act of Congress appropriating funds for relief.

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[32] Participation in political management and in political campaigns is now prohibited by the act of August 2, 1939. (See sec. 34, above.)

5. Solicitation or receipt of any thing of value, either for personal reward or as a political contribution, in return for the promise to use, or the use of influence to secure an appointive office under the United States.

6. Payment or the offer of payment for the use of influence in securing an appointive office under the United States.

[fol. 137] 7. Promising employment, compensation, or other benefit made possible by act of Congress as consideration or reward for political activity.

8. Discrimination by an officer or employee in favor of, or against, another officer or employee on account of political contributions.

9. Depriving any person on account of race, creed, color, or political activity, of compensation or other benefit made possible by any act of Congress appropriating funds for relief.

10. Disclosure for political purposes of any list or names of persons receiving benefits under an act of Congress appropriating funds for relief and the receipt of such a list for political purposes.

VI. Political Assessments

37. Solicitation or receipt of political contributions from Federal employees.—The United States Code, title 18, section 208 (Criminal Code, sec. 118, as amended), provides as follows:

It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Section 5 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads as follows:

It shall be unlawful for any person to solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any person known by him to be entitled to or receiving compensation, employment, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes.[33]

38. Circulars of solicitation bearing names of Federal employees.—In an opinion of October 17, 1902 (24 Op., 133), the Attorney General held that the sending of a circular letter by a political committee to Federal officers and employees soliciting financial aid in Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil Service Act (now sec. 118 of the Criminal Code), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee of the United States. The statute unquestionably condemns all such circulars, notwithstanding the particular form of words adopted, in order to show a request rather than a demand, and to give the responses a quasi-voluntary character.

[fol. 138] 39. "Political assessments" defined.—The following is an extract from the decision in *United States* v. *Scott* (74 Fed., 213), in the Circuit Court of the District of Kentucky, rendered October 7, 1895, by Taft, J.:

To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words "for a political purpose" may reasonably be construed to qualify not only the contribution but the solicitation. Similarly, to charge that a man received from another his contribution

[33] Under section 8 of the act penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

for a political purpose, by implication charges that the reception was for the same purpose as the contribution. * * * Nor was it necessary to set out the specific averment that the defendant knew that the persons from whom the contributions were received were officers of the United States.

The following extract is from the decision rendered by McCall, J., in the case of *United States* v. *Dutro, L. W.*, 1913, Western District of Tennessee (unreported):

The statute under which the indictment was found prohibits (and I shall speak of this concrete case) the postmaster at Memphis, Tenn., from receiving, or being in any manner concerned in receiving, any assessment, subscription, or contribution for any political purpose whatever from any official, clerk, or employee of the United States.

There are four counts in the indictment. Two of them charge the defendant with receiving subscriptions and contributions for political purposes from an officer, clerk, or employee of the United States, and two of them charge defendant with being concerned in receiving such assessment or subscription for political purposes from a clerk or employee of the United States.

Evidently one of the purposes of Congress in enacting the legislation was to prohibit superior officers from bringing pressure to bear upon their subordinates in order to secure contributions for campaign purposes, and the act is couched in very broad terms.

This evidence (which so far is uncontradicted) shows that the defendant, Mr. Dutro, did receive two contributions for campaign purposes from an officer or clerk or employee of the United States. Whatever may have been Mr. Dutro's frame of mind in regard to his connection with it, the one fact remains, as the evidence shows, that he received these contributions for the purposes and from the parties which the law prohibits. Perhaps and no doubt he did so without any thought that he was violating any statute, and felt that he was acting purely as a conveyor of these contributions to the political parties for whom they were intended, to accommodate those who were making the contributions, and purely as a personal matter.

but I think under the evidence his action was in violation of the statute.

The other two counts, as I have pointed out, charge the defendant with being concerned in receiving assessments, subscriptions or contributions for campaign purposes from a clerk, employee, or officer of the United States. There is a controversy here between counsel as to what the word "concerned" means. From what the law books say which have been read here, and from my own impression, it seems that the word "concerned" means to be interested in, or take part in, receiving such contributions. If Mr. Dutro, by his connection with these two subscriptions, took a part in the [fol. 139] contributions being made by employees of the Government for campaign purposes, he would be guilty. I think the natural construction of the phrase or term or word necessarily leads to the conclusion that he did take a part in receiving the contributions, because he received and conveyed them from the contributors to the parties for whom they were intended, and, as the proof so far shows, he knew that the parties who were making the contributions were clerks under him in the Post Office Department, and he knew the purpose for which the money was to be used and where it was to go.

The foregoing case definitely establishes the principle that an employee of the Government who receives a political contribution from another such employee as a mere agent or messenger for the purpose of turning it over to a political organization commits a violation of the statute.

40. Solicitation or receipt of political contribution in Federal buildings.—The United States Code, title 18, section 209 (Criminal Code, sec. 119), provides that—

No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208 of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

41. Letters addressed to Federal buildings.—The Commission by a minute of March 23, 1897, held that addressing a letter to a Government employee in a Government build-

ing soliciting political contributions is a solicitation in that building within the meaning of section 12 of the Civil Service Act, but notwithstanding numerous violations no opportunity arose of having the question judicially determined until 1907, when an indictment was obtained against Edward S. Thayer at Dallas, Texas. A demurrer to the indictment was sustained on the ground that the act required the personal presence in the Government building of the solicitor. Appeal was taken to the Supreme Court, and the judgment of the lower court was reversed. (*United States* v. *Thayer*, 209 U. S. 39.) The opinion of the Court, delivered by Justice Holmes on March 9, 1908, establishes definitely the proposition that solicitation by letter or circular addressed to and delivered by mail or otherwise to an officer or employee of the United States at the office or building in which he is employed in the discharge of his official duties is a solicitation "in a room or building" within the meaning of this section, the solicitation taking place where the letter was received. (See also *United States* v. *Smith*, 163 Fed., 926, where the letter was personally delivered.)

42. Letters delivered in Federal buildings.—The Commission holds that the sending through the mails of letters to Government employees soliciting political contributions, their street or home address being omitted from the envelopes, with the result that the letters are delivered by the postal authorities in the Government building in which they are employed, constitutes a violation of this section. It is a maximum of the law that a person is presumed to intend the natural and probable consequences of his acts, and failure or omission to take measures to avoid delivery of such letters in a Government building will render the offender liable to prosecution.

[fol. 140] 43. Discrimination on account of political contributions.—The United States Code, title 18, section 210 (Criminal Code, sec. 120), provides as follows:

No officer or employee of the United States mentioned in section 208 of this title shall discharge or promote or degrade or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting

to make any contribution of money or other valuable thing for any political purpose.

(See also sec. 52 herein.)

44. Payment of political contributions by one employee to another.—The United States Code, title 18, section 211, (Criminal Code, sec. 121), provides as follows:

No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

45. Penalties for assessments.—The United States Code, title 18, section 212 (Criminal Code, sec. 122), provides that—

Whoever shall violate any provision of sections 208 to 211 of this title shall be fined not more than $5,000 or imprisoned not more than 3 years, or both.

46. Foregoing offenses declared felonies.—By section 15 of the Civil Service Act it was declared that persons violating any provisions of the four preceding sections should be guilty of a misdemeanor, but this section is now superseded by section 122 of the Criminal Code, above quoted, which makes such violation a felony in view of the following provision of section 335 of the Criminal Code (U. S. C., title 18, sec. 541):

All offenses which may be punished by death or imprisonment for a term exceeding 1 year shall be deemed felonies. All other offenses shall be deemed misdemeanors.

VII. Purchase and Sale of Public Office

47. Payment for influence in procuring appointive public office prohibited.—The United States Code, title 18, section 149, provides as follows:

It shall be unlawful to pay or offer or promise to pay any sum of money, or any other thing of value, to any person, firm, or corporation in consideration of the use or

promise to use any influence, whatsoever, to procure any appointive office under the Government of the United States for any person whatsoever.

48. Receiving payment for influence in procuring appointive public office prohibited.—The United States Code, title 18, section 150, provides as follows:

It shall be unlawful to solicit or receive from anyone, whatsoever, either as a political contribution, or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the promise of support, or use of influence, or for the support or influence of the payee, in behalf of the person paying the money, or any other [fol. 141] person, in obtaining any appointive office under the Government of the United States.

49. Punishment for violation.—The United States Code, title 18, section 151, provides:

Anyone convicted of violating sections 149 and 150 of this title shall be punished by imprisonment of not more than 1 year, or by a fine of not more than $1,000, or by both such fine and imprisonment.

50. Promising benefits for political activity.—Section 3 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads:

It shall be unlawful for any person, directly or indirectly to promise any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any act of Congress, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election.[34]

VIII. Political Coercion

51. Section 2, clause second, of the Civil Service Act directs that the civil-service rules "shall provide and declare as nearly as the conditions of good administration will warrant, as follows: * * * Sixth. That no person in

[34] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

said service has any right to use his official authority or influence to coerce the political action of any person or body." In pursuance of this section, civil-service rule I, section 1, provides, in part, that "No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof." This provision applies to all persons in the executive civil service, nonclassified as well as classified, and is held to prohibit a superior officer from requesting or requiring the rendition of any political service or the performance of political work of any sort by subordinates.

Section 1 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads as follows:

That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions.[34]

Section 7 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads:

No part of any appropriation made by any act, heretofore or hereafter enacted, making appropriations for work relief, relief, or otherwise to increase employment by providing loans and grants for public-works projects, shall be used for the purpose of, and no authority conferred by any [fol. 142] such act upon any person shall be exercised or administered for the purpose of, interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.[34]

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[34] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

IX. Political Discrimination

52. Failure to contribute or render political service not prejudicial.—Section 2, clause second, of the Civil Service Act reads:

> Fifth. That no person in the public service is for that reason under any obligations to contribute to any political fund or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Section 4 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads as follows:

> It shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election.[34]

53. No disclosure as to opinions or affiliations.—Section 2 of rule I provides as follows:

> No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of an applicant, eligible, or employee in the classified service because of his political or religious opinions or affiliations.

(See sec. 16 herein.)

54. Definition of discrimination.—Political discrimination consists in giving appointment, promotion, or any other favor to an appointee, eligible, or candidate because of his politics, or withholding appointment, promotion, or any other favor from an appointee, eligible, or candidate be-

[34] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

cause of his politics. An appointing officer who appoints or refuses to appoint an applicant because the applicant does or does not entertain certain political opinions, who makes any inquiry of the applicant or any other person as to the applicant's political opinions or affiliations, or reduces an employee because that employee refuses to render political service, to be coerced in political action, or to contribute money for political purposes, or who advances or promotes an employee for opposite reasons, violates the Civil Service Act and rules.

X. Political Recommendation

55. Senators and Representatives.—Section 10 of the Civil Service Act provides:

That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or Member of the House of [fol. 143] Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

56. Disclosing politics.—Rule I, section 3, provides as follows:

No recommendation of an applicant, eligible, or employee in the classified service involving disclosure of his political or religious opinions or affiliations shall be considered or filed by the Civil Service Commission * * *, or by any officer concerned in making appointments or promotions.

57. Letters disclosing politics not to be considered.—It is the duty of officers concerned in making appointments or promotions to refuse to receive or consider letters disclosing the politics or religion of an applicant, eligible, or employee and to explain to the writers that communications based upon such grounds will not receive attention or be filed.

58. Recommendation for promotion.—Rule XI, section 3, provides that—

No recommendation for promotion except in the regular form of periodical service-rating reports or unless it be made by the person or persons under whose supervision

such employee has served shall be considered by any officer concerned in making promotions. Recommendation in any other form or by any other person, if made with the knowledge and consent of the employee, shall be sufficient cause for debarring him from the promotion proposed, and a repetition of the offense shall be sufficient cause for removing him from the service.

59. Disclosure of names for political purposes.—Section 6 of the act of August 2, 1939 (Public, No. 252, 76th Cong.), reads:

It shall be unlawful for any person for political purposes to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment, or benefits provided for or made possible by any act of Congress appropriating, or authorizing the appropriation of, funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes.[34]

XI. Jurisdiction of Commission

60. Withholding salary of employees engaged in political activity.—Civil-service rule XV reads as follows:

For the proper supervision and enforcement of its functions, the Commission shall, if it finds that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or of the rules promulgated in accordance therewith, or in violation of any Executive order or any regulations of the Commission, or that any employee subject to such act, rules, orders, or regulations is taking active part in political management or political campaigns, after notice to the person affected and opportunity for explanation, certify the

[34] Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

facts to the proper appointing officer with specific recom-
[fol. 144] mendation for discipline or dismissal; and such appointing officer shall carry out the recommendation. In the event of any continued violation for 10 days after such recommendation, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall not pay or allow the salary or wages of such person thereafter accruing.

61. Commission's determinations final.—The General Accounting Office is without jurisdiction to review the determinations of the Civil Service Commission under rule XV (see above) and, upon certification by the Commission that an employee is holding a position in violation of the Civil Service Act and rules, the General Accounting Office has no alternative to withholding credit for payments made for salary or compensation (decision, Comptroller General, July 20, 1939, to the Postmaster General).

[fol. 145] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION—Filed June 29, 1944

CITY OF WASHINGTON,
District of Columbia, ss:

Kenneth C. Vipond, being duly sworn, deposes and says:

I am the Acting Executive Director and Chief Examiner of the United States Civil Service Commission, and in that capacity am thoroughly familiar with all of the circulars and publications of said Commission.

I have been shown a copy of Form 1982, annexed hereto as Exhibit A, published by the United States Civil Service Commission which, I understand, has been added to the amended complaint of the plaintiffs in the above-entitled matter.

As Mr. Moyer has already stated in his affidavit which has heretofore been filed in this proceeding, the United States Civil Service Commission does not have the statu-

tory authority to enforce, and does not enforce, Section 9 (a) of the Hatch Act with respect to any Federal employees except those who are employees of the United States Civil Service Commission.

[fol. 146] Form 1982, now annexed to the amended complaint as Plaintiffs' Exhibit II, is addressed to Federal employees for their advice and guidance. The Civil Service Commission deems it part of its functions to inform all Federal employees of the statutes, rules and regulations applicable to their employment. It will be noted in this connection that Form 1982 itself refers not only to possible violations of the Hatch Act, but also refers to violations of the statute forbidding the making of political contributions in a Federal building. In addition to this circular, the Civil Service Commission prepares and issues various other publications advising Federal employees of their rights, liabilities, and duties so that they may govern themselves accordingly. Annexed to Mr. Moyer's original affidavit is the latest pamphlet published by the Civil Service Commission dealing with political activities and assessments of Federal employees. It will be noted that this pamphlet relates not only to the Hatch Act but to numerous other statutes and regulations which are of particular concern to Federal employees.

Part of Form 1982 refers to political activities on the part of certain State or local agency employees covered by Section 12 (a) of the Hatch Act. This Section of the Hatch Act specifically gives to the Civil Service Commission the duty to enforce the provisions of the statute applicable to this class of persons. With reference to such persons (who are not Federal employees), the Civil Service Commission does enforce the applicable provisions of the Hatch Act.

It was not the intention of the Civil Service Commission in Form 1982 to declare or imply that it was enforcing, [fol. 147] or would enforce, Section 9 (a) of the Hatch Act as to Federal employees (except with respect to its own employees), nor does any such statement appear in Form 1982.

Federal employees subject to the Hatch Act are advised in Form 1982 that the penalty for established violations of Section 9 (a) of the Hatch Act is removal from office, but

there is no statement that such removal can, or will be made by the United States Civil Service Commission.

Kenneth C. Vipond.

Subscribed and sworn to before me this 28 day of June, 1944. R. E. Soneder, Notary Public of District of Columbia. My commission expires Jan. 14, 1946. (Seal.)

NOTE: Exhibit A annexed hereto is the same as Exhibit II attached to Motion to Amend Complaint, at page 149 of this transcript.

[fol. 148] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO AMEND COMPLAINT—Filed June 29, 1944

Plaintiffs move the court to amend the complaint in the above-entitled action by adding to paragraph 22 thereof the following sentences:

Defendants have, both prior to and since the filing of this complaint, publicized in Civil Service Commission Form 1982, the fact that they will cause the removal of any employee in the classified civil service who commits any of the acts forbidden by the second sentence of section 9(a) of the Hatch Act as amended. This publication is conspicuously posted in various places where employees in the classified civil service perform their duties. A copy of Civil Service Commission Form 1982 is attached hereto as Exhibit II.

Dated: June 29, 1944.

Respectfully Submitted, Lee Pressman, Attorney for Plaintiffs.

(Here follows 1 photolithograph, side folio 149)

EXHIBIT II

Form 1966
June 1942

[POST CONSPICUOUSLY]

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

FILED
JUN 29 1944
C. A. 24007 CHARLES E. STEWART,
Clerk

WARNING

POLITICAL ACTIVITY OF FEDERAL EMPLOYEES PROHIBITED

THE LAW

"It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. * * *" (Section 9 (a), Act of August 2, 1939, as amended by the Act of July 19, 1940.)

"Persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States * * *." (Section 14, Act of August 2, 1939, as amended by the Act of July 19, 1940.)

POLITICAL ACTIVITY OF CERTAIN EMPLOYEES OF A STATE OR LOCAL AGENCY PROHIBITED

THE LAW

"No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office or affecting the result thereof; or, (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates." (Section 12 (a), Act of August 2, 1939, as amended by the Act of July 19, 1940.)

IN GENERAL

The statutes quoted above being public laws, all persons within their scope are presumed to be acquainted with their provisions, and ignorance thereof will not excuse a violation. Partisan activity in connection with municipal, county, State, or National elections, primary or regular, in which political party candidates are involved is prohibited. The restrictions regarding political activity apply to temporary employees, employees on leave of absence, with or without pay, and substitute employees during their periods of active employment.

THE PENALTY FOR ESTABLISHED VIOLATIONS IS REMOVAL.

AMONG THE FORMS OF POLITICAL ACTIVITY *PROHIBITED* ON THE PART OF FEDERAL OR STATE OR LOCAL AGENCY OFFICERS AND EMPLOYEES WHO ARE WITHIN THE SCOPE OF THE ABOVE-QUOTED LAWS ARE—

Serving on or for any political committee, party, or other similar organization.

Soliciting or handling political contributions.

Serving as officer of a political club, as member or officer of any of its committees, addressing such a club or being active in organizing it.

Serving in connection with preparation for, organizing, or conducting a political meeting or rally, addressing such a meeting, or taking any other active part therein except as a spectator.

Engaging in political conferences while on duty, or canvassing a district or soliciting political support for a party, faction, or candidate.

Manifesting offensive activity at the polls, at primary or regular elections, soliciting votes, assisting voters to mark ballots, or helping to get out the voters on registration or election days.

Acting as recorder, checker, watcher, or challenger of any party or faction.

Serving in any position of election officer, in which partisanship or partisan political management may be shown.

Publishing or being connected editorially or managerially with any newspaper generally known as partisan from a political standpoint; or writing for publication or publishing any letter or article, signed or unsigned, in favor of or against any political party or candidate. Ownership entirely disassociated from editorial control and managerial activities limited entirely to business management would not be regarded as being within this provision.

Becoming a candidate for nomination or election to office, Federal, State, or local, which is to be filled in an election in which party candidates are involved.

Distributing campaign literature or material.

Initiating or circulating political petitions, including nomination petitions.

Assuming political leadership or becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office.

GENERAL STATEMENTS AS TO CERTAIN ACTIVITIES WHICH ARE CONSIDERED AS PERMISSIBLE ON THE PART OF ALL OFFICERS AND EMPLOYEES SUBJECT TO THE ABOVE-QUOTED STATUTES

VOTING.—The direct language of the law specifically provides that all such persons retain the right to vote as they may choose.

EXPRESSION OF OPINIONS.—The right to express political opinions is reserved to all such persons. NOTE.—This reservation is subject to the prohibition that such persons may not take any active part in political management or in political campaigns.

CONTRIBUTIONS.—It is lawful for any officer or employee to make a voluntary contribution to a regularly constituted political organization, *provided* such contributions are not made in a Federal building or to some other officer or employee within the scope of the above-quoted statutes.

POLITICAL PICTURES.—It is lawful for any officer or employee to display a political picture in his home if he so desires.

BADGES, BUTTONS, AND STICKERS.—While it is not unlawful for an officer or employee to wear a political badge or button or to display a political sticker on his private automobile (except where forbidden by local ordinance), it is felt that it is inappropriate for any public servant to make a partisan display of any kind while on duty, conducting the public business.

NOTICE

All persons within the scope of the Political Activities Law must take *the responsibility for seeing* that their activities are not such as would constitute violations of the restrictions of the political activity statutes. In case of doubt as to whether or not any particular activity is prohibited, prior to engaging in the questionable activity, the employee involved should present the matter in writing to the U. S. Civil Service Commission for consideration.

Further information is contained in Form 1236 dealing with Federal officers and employees and Form 1216a dealing with officers and employees of the State or local agency, which may be obtained from the Commission, its District managers, or any local civil-service board.

It is the duty of any person having knowledge of the violation of any of the foregoing provisions of law to submit the facts to the U. S. Civil Service Commission, Washington, D. C., or to the agency employing the person thought to be violating the law.

[fol. 150] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER AMENDING COMPLAINT—Filed June 29, 1944

It is hereby ordered that the complaint in the above-entitled action be amended by adding to paragraph 22 thereof the following sentences:

Defendants have, both prior to and since the filing of this complaint, publicized in Civil Service Commission Form 1982, the fact that they will cause the removal of any employee in the classified civil service who commits any of the acts forbidden by the second sentence of section 9(a) of the Hatch Act as amended. This publication is conspicuously posted in various places where employees in the classified civil service perform their duties. A copy of Civil Service Commission Form 1982 is attached hereto as Exhibit II.

Dated: June 29, 1944.

D. Lawrence Groner, Chief Judge of the United States Court of Appeals for the District of Columbia. Jennings Bailey, Associate Justice of the District Court of the United States for the District of Columbia. Jas. W. Morris, Associate Justice of the District Court of the United States for the District of Columbia.

[fol. 151] In the District Court of the United States

Civil Action No. 24007

United Federal Workers of America (C.I.O.), et al., Plaintiffs,

v.

Harry B. Mitchell, et al., Defendants

Before Groner, Chief Justice, United States Court of Appeals, District of Columbia; and Bailey and Morris, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court

Opinion—Filed August 4, 1944

Bailey, J.:

This is an action brought to declare invalid, as in contravention of the Constitution of the United States, the second sentence of Section 9(a) of the Act of August 2, 1939, as amended, popularly known as the Hatch Act (U. S. C. 61h (a); 53 Stat. 1147, 1148; 54 Stat. 767; 56 Stat. 181), and to enjoin the defendants, members of the United States Civil Service Commission, "from enforcing, threatening to enforce, or otherwise acting" pursuant to that provision. Defendants have moved to dismiss the action and for summary judgment, the motion being accompanied by affidavit.

The following are the pertinent statutes and regulations:

Section 9(a) of the Hatch Act is as follows:

"It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in po-

litical management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects [fol. 152] and candidates. For the purposes of this section the term 'officer' or 'employee' shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal Laws."

Section 9(b) of the Hatch Act is as follows:

"Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

Section 15 of the Hatch Act is as follows:

"The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil service rules prohibiting such employees from taking any active part in political management or in political campaigns." (18 U. S. C. 610; 54 Stat. 767).

Section 18 of the Hatch Act is as follows:

"Nothing in the second sentence of section 9(a) . . . shall be construed to prevent or prohibit any person subject to the provisions of this subchapter from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the

candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party." (18 U. S. C. 61r; 54 Stat. 767).

Revised Statutes Section 1753 (5 U. S. C. 631) contains the following provision:

"The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter * * * and may * * * establish regulations for the conduct of persons who may receive appointments in the civil service."

[fol. 153] In the exercise of power conferred by R. S. Section 1753, and by the Civil Service Act, the President has promulgated a number of Civil Service Rules. Civil Service Rule I is as follows:

"No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns" (5 C. F. R. 1943 Cum. Supp., 1.1).

Civil Service Rule XV is as follows:

"Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether

by original appointment, promotion, assignment, transfer, or reinstatment, in violation of the Civil Service Act or Rules, or of any Executive Order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing." (Executive Order No. 8705, March 5, 1941) (5 C. F. R. 1943 Cum. Supp., 15.1).

This action is brought by the United Federal Workers of America, an unincorporated labor union composed of employees of the United States Government, and 12 individual plaintiffs, each of whom occupies a position in the Federal government under the classified civil service. The defendants are the duly appointed and acting members of the United States Civil Service Commission.

The plaintiff union asserts that it has "an interest in protecting and restoring the rights of its membership" and that it brings this action "as a representative of, and on behalf of, all of its members, including those who have not specifically joined in suing individually, who are subject to the provisions of the second sentence of Section 9 (a) of the Hatch Act."

The plaintiffs charge that if they engage in the activities forbidden by Section 9 (a) of the Hatch Act the defendants [fol. 154] will cause them to be dismissed; that plaintiff Poole has already conducted political activities in violation of said Section 9 (a), and that the defendants have already commenced proceedings for his dismissal from the employ of the United States.

The defendants contend that neither plaintiff union nor the individual plaintiffs can maintain this action; that it is not claimed that the union is prevented from engaging in any political activity; that a union does not stand in a position where it can assert the individual rights of its members; that the plaintiffs, other than Poole, have only hy-

pothetical issues, and that they are not hurt because they have done nothing in violation of the Act.

Whether or not the union can maintain this action in a representative capacity the individual plaintiffs are in a different situation. The mere existence of the statute, saying that they shall not engage in political activity, the penalty in the statute that they shall be dismissed if they do, and the warning addressed to them by the Civil Service Commission in their posters certainly prevent them from engaging in such activity, if the statute is constitutional. If the statute is unconstitutional, they are being prevented from things which they have the right to do. If the statute is constitutional, it is mandatory that they be dismissed for doing such things. As to the plaintiff Poole, he has done the things denounced by the statute. If the Act is valid, dismissal is mandatory. There is no need for him to follow further administrative procedures. The provisions of Civil Service Rule XV that in case of any violation of the Civil Service Act or Rules or of any Executive Order or any regulation of the Commission the Commission shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal is now controlled by the provisions of the Hatch Act that in case of violation of Section 9 (a) of that Act, dismissal is mandatory.

We are of the opinion, therefore, that the individual plaintiffs have such an interest as to give them the right to maintain this suit.

[fol. 155] The defendants further contend that the Civil Service Commission has no responsibility under the law to enforce the Hatch Act, and, therefore, no action can be maintained against them (except as to their own employees, of whom none are parties in this case) in which the constitutionality of the Hatch Act can be determined. It is true that the Hatch Act does not specifically charge the Civil Service Commission with the enforcement of the particular provision here involved. The situation is this: Revised Statutes, Section 1753 (5 U. S. C. 631) authorizes the President to prescribe regulations for the conduct of persons who may receive appointments in the Civil Service. Pursuant to that authority, Rule I, Section 1, was promulgated by Executive Order, providing, among other things:

"Persons who by the provisions of these rules are in competitive classified service, while retaining the right

to vote as they please and to express *privately* their opinions on all political subjects, shall take no active part in political management or in political campaigns."

By Rule XV, it is provided that, if the Commission finds that any person is holding a position in violation of the Civil Service Act, or the rules promulgated thereunder, or in violation of any Executive Order, or any regulations of the Commission, or that any employee subject to such act, rules, orders, or regulations is taking active part in political management or political campaigns, after notice to the person affected and opportunity for explanation, it shall certify the facts to the proper appointing officer with specific recommendation for *discipline or dismissal*. In the event of any continued violation for ten days after such recommendation, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall not pay or allow the salary or wages of such person thereafter accruing.

The second sentence of the above-quoted Section 9 (a) of the Hatch Act provides:

"No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material, shall take any active part in political management or in political campaigns."

[fol. 156] It is this sentence which the plaintiffs claim to be unconstitutional.

It will be seen that the Congress here applies to all governmental employees, except those expressly excepted, the same rule of conduct respecting active participation in political campaigns and management as that which had theretofore applied only to Civil Service classified employees, with the exception that the word "privately" in the former Civil Service Rule was eliminated. It will also be observed that the penalty for such action is dismissal rather than as had theretofore in the Civil Service Rules been discipline or dismissal. It is significant that, after the enactment of the Hatch Act, the Civil Service Commission Rule I was altered to bring it into conformity with that Act

by also eliminating the word "privately," and this was done, as stated in the Commission's brief, at page 15,

> "As a matter of fact, rather than Civil Service Rules I and XV being incorporated into the Hatch Act, the Hatch Act has compelled changes in the Rules."

It is true that there is no statement in the Hatch Act that Rule I of the Civil Service Commission is incorporated in Section 9 (a), but it is also true that the very words of that rule, with the exception of the word "privately," are the words of Section 9 (a). It has been recognized by the Executive Departments, pursuant to an opinion of the Attorney General, dated June 8, 1941, that by virtue of the Hatch Act the penalty for all employees, both classified and those not classified, is dismissal and not as theretofore provided respecting classified employees in Rule XV of the Civil Service Commission discipline or dismissal. It is argued by the Commission in its brief that the enforcement of the Hatch Act in this regard lies with the appointing authority having jurisdiction of the particular employee, namely, the head of a department or independent agency. This seems to be in accordance with the broad language in an opinion of the Attorney General, dated July 22, 1940 (39 Opinions of Attorney General 462). It will be noted that this opinion was prior to the Opinion of the Attorney General, first above referred to, and it will also be noted that there is no discussion of any difference of enforcement as to [fol. 157] classified employees and those not classified.

Our conclusion is that the Congress moved into the field which had previously only been partially occupied by the rules of the Civil Service Commission, and which were applicable only to classified employees; that the Congress superseded the rules insofar as conduct is concerned, and made such rules applicable alike to both classified and unclassified employees; that Congress left the matter of enforcement of such rules of conduct where it found it, namely, that the Civil Service Commission, under rules of conduct which must be brought into accord with the Act of Congress, still retain the duty to enforce the proper penalty with respect to classified employees as they had theretofore had the power to do; and that the appointing authorities, namely, the heads of departments and independent agencies, who before the enactment of the Hatch

Act were responsible for disciplinary measures, including dismissal, of employees not classified, remain charged with the duty of enforcement of such discipline, including dismissal, only they are required to apply the rules of conduct and disciplinary measures set forth in the Hatch Act. Viewed in this light, it seems clear that the Hatch Act, insofar as it is here involved, determines what the rules of the Civil Service Commission should be and what disciplinary penalties should be imposed upon a classified employee without disturbing the existing authority of the Commission to visit such punishment upon a classified employee. If this be so, the individual plaintiffs in this cause and the Civil Service Commission have a very real concern and controversy as to the validity of the provisions of the Hatch Act here involved. We hold, therefore, that this suit is properly brought against the defendants.

Plaintiffs claim that the second sentence of Section 9 (a) of the Hatch Act is unconstitutional in that it violates fundamental rights of the plaintiffs guaranteed by the First Amendment to the Constitution, providing that "Congress shall make no law abridging * * * freedom of speech, or of the press, or of the right of the people peaceably to assemble" and that it deprives plaintiffs of liberty and [fol. 158] property without due process of law in violation of the Fifth Amendment to the Constitution, and that it disparages and denies to the plaintiffs fundamental right to engage in political activity reserved to the people by the Ninth and Tenth Amendments.

From the earliest times there have been certain restrictions respecting those who hold office or employment in the Government. President Jefferson in 1801 made the following order:

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments. Freedom of elections being essential to the mutual independence of governments and of the different branches of the same government, so vitally cherished by most of our constitutions, it is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am in-

structed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the sprit of the Constitution and his duties to it.

There has been a strong development toward safeguarding employees of the Government from insecurity attributable to political affiliation. While that has been accomplished to a much greater degree with respect to those occupying classified positions under the Civil Service, there is, nonetheless, a definite objective toward securing and keeping employees not in the classified service on the basis of merit rather than becaue of political activities on their part. As the Hatch Act has sought to extend to those latter much of the same protection theretofore afforded to classified employees, so it has imposed upon them the same restrictions heretofore recognized to be proper respecting classified employees. And in the instant discussion it is not to be lost sight of that the individual plaintiffs are all classified employees. The legislation hereunder consideration does not seek to take away from a Government employee his right to vote, nor his right to express his opinion on all political subjects. It does undertake to preclude him [fol. 159] from taking any active part in political management, or in political campaigns, and by that is meant activities particularly defined by the Civil Service Commission (Section 15 of the Hatch Act). In the debates leading up to the passage of the Hatch Act much was said about the limitation on the constitutional rights of those employees who were made subject to the Act. Most that was said was by those who considered the legislation to be an infringement of such rights. There can, therefore, be no doubt that it was the considered judgment of the Congress and of the President that the legislation was not such an infringement.

To say that the Congress has not the power to pass this legislation in the public interest, and in the interest of the

employees of the Government whose tenure it is seeking to protect, is to say that it is not rational for the Congress to conclude that it cannot take political activity out of the employment, promotion and dismissal of Government employees without at the same time taking Government employees out of political activity. This is a question for the Congress, and not the courts, to decide.

The plaintiffs challenge the legislation as being unreasonably discriminatory between the employees who come within the Act and certain employees excepted therefrom. First, the employees covered by the Act as compared with persons whose compensation is paid from appropriation for the office of the President, heads and assistant heads of Executive Departments, officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relation with foreign powers, or in the Nation-wide administration of Federal laws. It is perfectly obvious that these classes of employees are in very large measure political. No one supposes that they would not change with the changing of administrations. There is no need nor desire to protect them from political activity, and hence there is no corresponding occasion to restrict such activity on their part.

Section 18 of the Act provides that political activity shall not include certain elections where there are no can- [fol. 160] didates of a party whose electors have been voted for in a presidential election, nor an election in connection with any question which is not specifically identified with a national or state political party. Thus restriction is eliminated as to elections relating to constitutional amendments, referendums, approval or municipal ordinances and others of a similar character.

An amendment to the Act, which has application to certain state employees where the funds supporting the activity or institution with which they are connected are supplied in whole or in part by the Federal Government, exempts

> "any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United

States; or by any recognized religious, philanthropic, or cultural organization."

It is clear that this exemption deals primarily with teachers, though no doubt other types of work come within such exempting provisions. To deny to Congress the power to make this classification is to say that the Congress may not rationally conclude that, while it should lay restrictions upon the political activity of Government employees generally, it should not do so where the duties of their work are such as to require acts which come within the general interdiction. Certainly the classification is not unreasonable viewed in the light of the objective of the legislation.

A further exemption by amendment relates to the participation of Federal employees residing in municipalities or other political subdivisions adjacent to the District of Columbia insofar as local campaigns and elections are concerned. The reasonableness of these classifications seem too obvious to require discussion to show that there is no arbitrary discrimination such as would invalidate the legislation.

[fol. 161] All in all, we can see no sound reason for a conclusion that the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution.

The motion of the defendants for summary judgment should be sustained and the complaint dismissed.

D. Lawrence Groner, Jennings Bailey, Jas. W. Morris, U. S. Judges.

[fol. 162] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND FOR SUMMARY JUDGMENT—Filed September 26, 1944

The defendants, Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Fleming, members of the United States Civil Service Commission, having moved the Court for an order dismissing the complaint and granting summary judgment upon the grounds (1) that this Court lacks jurisdiction to grant the relief requested, and (2) that the

second sentence of Section 9(a) of the Act of August 2, 1939, as amended, is valid and constitutional, and

Said motion having come on to be heard and having heard the arguments of counsel in open court and upon consideration thereof, and upon consideration of the affidavits and the points and authorities of defendants in support thereof, and the points and authorities of plaintiffs in opposition thereto, and

The Court having determined that it does not lack jurisdiction to grant the relief requested and that the second sentence of Section 9(a) of the Act of August 2, 1939, as [fol. 163] amended, is in all respects valid and constitutional, it is, this 26th day of September, 1944, in accordance with the opinion of the Court rendered herein dated August 4, 1944,

Ordered, Adjudged and Decreed, that defendants' motion to dismiss the complaint and for summary judgment be, and the same hereby is, granted, and the complaint is accordingly dismissed and summary judgment is granted to the defendants.

D. Lawrence Groner, Jennings Bailey, James W. Morris, United States Judges.

Approved as to form:

Francis M. Shea, Assistant Attorney General; Lee Pressman, Attorney for Plaintiffs; Francis M. Shea, Attorney for Defendants.

[fol. 164] In the District Court of the United States

[Title omitted]

Petition for Appeal—Filed October 26, 1944

United Federal Workers of America (C.I.O.), Patrick T. Fagan, Harry V. Winegar, Jack M. Elkin, Rudolph Hinden, George P. Poole, Olivia Israeli Abelson, Joseph D. Phillips, Charles G. Shane, Albert J. Rieck, Richard Weber, L. E. Tempest and Margery Mitchell, plaintiffs in the above-entitled cause, feeling themselves aggrieved by the final judgment of the District Court rendered and entered in the above-entitled cause on the 26th day of September, 1944, do hereby appeal therefrom to the Supreme Court of the

United States because of errors prejudicial to the plaintiffs which are set forth in the assignment of errors presented and filed herewith, and pray that their appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the Supreme Court of the United States, in accordance with the rules of that Court.

October 25, 1944.

Lee Pressman, Attorney for Plaintiffs.

[fol. 165] In the District Court of the United States

[Title omitted]

Assignment of Errors and Prayer for Reversal—Filed October 26, 1944

United Federal Workers of America (C.I.O.), Patrick T. Fagan, Harry V. Winegar, Jack M. Elkin, Rudolph Hinden, George P. Poole, Olivia Israeli Abelson, Joseph D. Phillips, Charles G. Shane, Albert J. Rieck, Richard Weber, L. E. Tempest and Margery Mitchell, plaintiffs in the above-entitled cause, in connection with their petition for an appeal to the Supreme Court of the United States, hereby assign error to the entry of the final judgment entered on September 26, 1944, in the above-entitled cause and say that in the entry of the final judgment the said District Court committed error to the prejudice of said plaintiffs in the following particulars:

1. The Court erred in sustaining defendants' motion for summary judgment and dismissing plaintiffs' complaint.

2. The Court erred in failing to grant a declaratory judgment as prayed by plaintiffs.

3. The Court erred in failing to issue an injunction, as prayed by plaintiffs.

4. The Court erred in failing to hold that the second sentence of Section 9(a) of the Hatch Act of August 2, 1939, as amended 18 U. S. C., Section 61(h)(a) is invalid as repugnant to the Constitution of the United States on the ground that it infringes fundamental rights of freedom of

speech, of the press and of assembly guaranteed by the First Amendment of the Constitution.

5. The Court erred in failing to hold that the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States as a deprivation of the fundamental right of the people of the United States to en- [fol. 166] gage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments.

6. The Court erred in failing to hold that the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States, since it unreasonably prohibits Federal employees from engaging in activities which may be lawfully carried on by persons who are not Federal employees, thus constituting a deprivation of liberty in violation of the Fifth Amendment.

7. The Court erred in failing to hold that the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States since it effects an arbitrary and grossly unreasonable discrimination between employees of the Federal Government in the classified civil service subject to its provisions and employees specifically exempted therefrom, in violation of the Fifth Amendment.

8. The Court erred in failing to hold that the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution of the United States since it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law in violation of the Fifth Amendment.

Wherefore plaintiffs pray that the judgment of the District Court dismissing the complaint and granting defendants' motion for summary judgment may be reversed.

October 25, 1944.

Lee Pressman, Attorney for Plaintiffs.

[fols. 207-210] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 26, 1944

The plaintiffs herein having filed a petition for appeal to the Supreme Court of the United States from the final judgment entered herein on September 26, 1944, and having filed their assignment of errors, it is

Ordered, that an appeal by petitioners in the above-entitled cause to the Supreme Court of the United States from the judgment heretofore filed and entered herein on September 26, 1944, be and the same is hereby allowed and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that court, said appeal being hereby made returnable sixty (60) days from the date hereof.

October 26, 1944.

D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia.

[fol. 211] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER—Filed November 17, 1944

Upon consideration of plaintiffs' motion to extend time for filing the record on appeal, and it appearing to the Court that the motion should be granted, it is by the Court this 25th day of October, 1944;

Ordered, that the time for filing the record on appeal and the same is hereby extended up to and including November 25, 1944.

F. Dickinson Letts, Judge.

I consent, Charles Fahy, Solicitor General, Attorney for Defendants.

[fol. 212] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER—Filed November 20, 1944

The plaintiffs herein having heretofore applied for an order extending their time within which to perfect the appeal from the order entered in this action on August 2, 1944, and the said order having been granted and the time within which to perfect the said appeal extended to November 25, 1944, and good cause having been shown why an additional extension of time should be granted the plaintiffs, it is hereby

Ordered that the time within which the said appeal may be perfected be and the same hereby is extended to and including December 25, 1944.

Dated: November 20, 1944.

F. Dickinson Letts, Associate Justice of the United States District Court for the District of Columbia.

[fols. 213-216] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER FIXING BOND ON APPEAL—Filed December 16, 1944

The plaintiffs herein having filed a petition for appeal to the Supreme Court of the United States from the judgment entered herein on September 26, 1944, and an order allowing appeal having been made and entered on October 26, 1944, it is hereby

Ordered that the bond on appeal to be approved by this Court is fixed at the sum of Two Hundred and Fifty Dollars ($250.00).

D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia, Presiding as circuit judge in the above proceedings.

December 16, 1944.

MEMORANDUM

January 3, 1945.

Bond on appeal ($250) approved and filed.

[fol. 217] Citation in usual form, filed December 26, 1944, omitted in printing.

[fol. 218] In the District Court of the United States

[Title omitted]

Praecipe for Transcript of Record—Filed December 21, 1944

To: Charles E. Stewart, Esq., Clerk of the District Court of the United States for the District of Columbia.

Sir:

You are hereby requested to make a Transcript of Record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause, and to include in such Transcript of Record, the following papers, to wit:

1. Complaint and Exhibit I.
2. Order designating three-judge statutory court.
3. Motion for interlocutory injunction and the affidavits submitted in support thereof.
4. Notice of motion and motion to dismiss and for summary judgment and the affidavits and exhibits submitted in support thereof.
5. Motion to amend complaint filed June 29, 1944, and Exhibit II (Warning Notice) thereto attached.
6. Order dated June 29, 1944, amending complaint.
7. Opinion and decision of three-judge statutory court filed August 4, 1944.
8. Judgment dismissing the complaint filed on September 26, 1944.
9. Petition for appeal dated October 25, 1944.
10. Assignment of errors and prayer for reversal.
11. Statement as to jurisdiction and Exhibit A attached thereto (Exhibit B attached to the statement need not be [fol. 219] printed since it appears in No. 7 supra).
12. Order allowing appeal.
13. Notice of appeal; and admission of service of (a) notice of appeal, (b) petition for appeal, (c) order allowing appeal, (d) assignment of errors, and (e) statement as to jurisdiction.

14. Order fixing bond on appeal.
15. Memorandum evidencing deposit of $250 appeal bond.
16. Citation.
17. This praecipe and acknowledgment of service thereof.

Said Transcript to be prepared as required by law and the Rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court on or about December 26, 1944, in accordance with the Order allowing appeal.

Lee Pressman, Attorney for Plaintiffs.

December 21, 1944.

[fol. 220] I hereby acknowledge service of this praecipe on the 21st day of December 1944.

Charles Fahy, Solicitor General, Attorney for Defendants. (A. Q.)

[fol. 221] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 222] IN THE DISTRICT COURT OF THE UNITED STATES

ORDER

Upon consideration of the plaintiffs' motion to extend the time within which to docket the appeal in the Supreme Court of the United States taken from the judgment entered in this proceeding on September 26, 1944, and it appearing to the court that the motion should be granted, it is hereby

Ordered that the time for docketing the record on appeal in the above-entitled case be and the same hereby is extended up to and including January 15th, 1945.

D. Lawrence Groner, Presiding Judge.

December 21, 1944.

[fol. 223] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed February 5, 1945

In accordance with paragraph 9 of Rule 13 of the Rules of this Court the Appellant states the following points to be relied on:

1. The second sentence of Section 9 (a) of the Hatch Act of August 2, 1939, as amended 18 U. S. C., Section 61 h (a) is invalid as repugnant to the Constitution of the United States on the ground that it infringes fundamental rights of freedom of speech, of the press and of assembly guaranteed by the First Amendment of the Constitution.

2. The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States as a deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments.

3. The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States, since it unreasonably prohibits Federal employees from engaging in activities which may be lawfully carried on by persons who are not Federal employees, thus constituting a deprivation of liberty in violation of the Fifth Amendment.

4. The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States since it effects an arbitrary and grossly unreasonable discrimination between employees of the Federal Government in the classified civil service subject to its provisions and employees specifically exempted therefrom, in violation of the Fifth Amendment.

5. The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States since [fol. 224] it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made un-

lawful by other provisions of law, in violation of the Fifth Amendment.

The Appellant designates the following portions of the Record as necessary for the consideration of the above points: the entire Record.

Lee Pressman, Attorney for Appellant.

Dated February 5, 1945.

I hereby acknowledge service of this statement.

Charles Fahy, Solicitor General, Attorney for Appellees. (A. Q.)

Dated February 5, 1945.

[fol. 225] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—March 12, 1945

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court is postponed to the hearing of the case on the merits.

[fol. 226] IN THE SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed March 23, 1945

The record in the above case contains three publications of the United States Civil Service Commission, Form 1236, "Political Activity and Political Assessments of Federal Officeholders and Employees", dated 1939, 1942, and 1944 respectively. Because the 1944 edition of this publication contains substantially all the material contained in the 1942 edition in substantially the same form, and because the 1942 edition is out of print, it is stipulated between the parties that the 1942 edition may be omitted in printing but that

either party or both may refer to it whenever convenient or necessary.

Lee Pressman, Attorney for Appellants. Charles Fahy, Solicitor General, Attorney for Appellees.

March 22, 1945.

Endorsed on Cover: File No. 49,364. D. C. U. S., District of Columbia. Term No. 34. United Federal Workers of America (C.I.O.), et al., Appellants, vs. Harry B. Mitchell, Lucille Foster McMillin and Arthur S. Fleming. Filed February 2, 1945. Term No. 34, O. T., 1945.

FILE COPY

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 911 [redacted] 20

UNITED FEDERAL WORKERS OF AMERICA (C.I.O), ET AL.,

Appellants,

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN, AND ARTHUR S. FLEMING

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

LEE PRESSMAN,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 24007

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.), ET AL.,

Plaintiffs,

vs.

HARRY B. MITCHELL, ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION

(Filed Oct. 26, 1944, Charles E. Stewart, Clerk)

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, United Federal Workers of America (C.I.O.), Patrick T. Fagan, Harry V. Winegar, Jack M. Elkin, Rudolph Hinden, George P. Poole, Olivia Israeli Abelson, Joseph D. Phillips, Charles G. Shane, Albert J. Rieck, Richard Weber, L. E. Tempest and Margery Mitchell, plaintiffs in the above-entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the judgment of the District Court.

This is an action brought by plaintiffs in the District Court of the United States for the District of Columbia, to enjoin defendants, who are members of, and constitute, the United States Civil Service Commission, from enforcing the

provisions of the second sentence of Section 9 (a) of the Hatch Act of August 2, 1939, as amended, 18 U. S. C. Section 61 h (a); 53 Stat. 1148, 54 Stat. 767, 56 Stat. 181, and to secure declaratory judgment of the invalidity of these provisions of law on the ground that they are repugnant to the Constitution of the United States. A statutory three-judge court was convened pursuant to the provisions of Section 380 (a) of Title 28 U. S. C. 50 Stat. 751. The statutory court on September 26, 1944, entered judgment dismissing the complaint on the merits, holding that the statute challenged was valid and not repugnant to the Constitution.

A. Statutory Provisions On Which Jurisdiction Rests

The statutory provisions which confer jurisdiction upon the Supreme Court to review the judgment are:

Section 380 (a) of Title 28 U. S. C., 50 Stat. 751, which reads as follows:

> "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit

judge, as the case may be, to designate immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court, making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the earliest possible times and

shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of law."

B. The Statute of the United States Involved in the Action

The validity of the second sentence of Section 9 (a) of the Hatch Act of August 2, 1939, as amended, 18 U. S. C. Section 61 (a), 53 Stat. 1148, 54 Stat. 767, 56 Stat. 181, is challenged in this action on the ground that it is repugnant to the Constitution of the United States. Section 9, in its entirety, reads as follows:

(a) "It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purpose of this section the term 'officer' or 'employee' shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign

powers or in the Nation-wide administration of Federal laws.

(b) "Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person."

Also pertinent to this section is Section 15 of the Hatch Act of July 19, 1940, 18 U. S. C. Section 61 (c) which reads as follows:

"The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns."

The interpretations of the Civil Service Commission incorporated into the second sentence of Section 9 (a) of the Hatch Act by Section 15 thereof are set out in Civil Service Commission Form 1236. A copy of the most recent edition of that Form is attached as Exhibit A.

C. Dates of Judgment and Petition for Appeal

The date of the final judgment of the District Court here sought to be reviewed is September 26, 1944.

Petition for allowance of appeal was presented on October 25, 1944.

D. Substantial Nature of the Question Presented

This is an action instituted by the United Federal Workers of America (CIO), an unincorporated labor union composed of employees of the Federal Government, on behalf of those of its members who are in the classified civil service, and by twelve individuals who occupy positions in the Federal Government which are under the classified civil service. The suit is brought to secure a declaration of the invalidity of, and an injunction against the enforcement of the provisions of the second sentence of Section 9 (a) of the Hatch Act on the ground that the prohibitions imposed by this Section deprive plaintiffs of the basic civil rights of freedom of speech, of assembly and of the press, the right to engage in political activity, and the right to be free from arbitrary discrimination in their Federal employment, guaranteed to them by the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

The second sentence of Section 9 (a) of the Hatch Act forbids plaintiffs to "take any active part in political management or political campaigns". The penalty for engaging in any of the activities thus forbidden is dismissal from the office held by the employee as prescribed by Section 9 (b) of the Hatch Act. The general terms of the prohibition are given content by Section 15 of the Hatch Act which incorporates into Section 9 (a) certain interpretations of the Civil Service Commission which specify certain acts as constituting active participation in political management or political campaigns. As the language of Section 9 (a) is thus defined, it prohibits Federal employees subject to its terms from doing such acts as writing a letter to a newspaper with reference to a candidate or political issue, make public speeches on such subject, persuade others to their point of view publicly or privately when such conduct constitutes active participation in a political campaign, dis-

tribute leaflets or other literature, participate in a parade, initiate a petition, and perform other acts which have been traditionally regarded as obvious forms of the exercise of the rights of freedom of speech, of the press and of assembly.

The statutory court held that the second sentence of Section 9(a) of the Hatch Act was valid and did not infringe on any rights of plaintiffs protected by the Constitution. The court rested this conclusion on the ground that Congress had authority to remove Federal employment from the sphere of political activity and the reasonableness of the means used to reach this result is a question for Congress and not the courts to decide.

Accordingly, the questions presented include the following:

1. Whether the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution on the ground that it prohibits the free exercise of the rights of freedom of speech, of the press and of assembly guaranteed to all persons by the First Amendment of the Constitution of the United States.

The United States Supreme Court has held unconstitutional statutes and ordinances which place a restraint upon the right of free speech, press and assembly. *Thornhill v. Alabama*, 310 U. S. 88; *Lovell v. City of Griffin*, 303 U. S. 44; *Schneider v. New Jersey*, 308 U. S. 147. The Hatch Act places restrictions upon the exercise of such rights by Federal workers. It is well settled that such restraints are permissible only if there exists a clear and present danger of an evil which the government has an interest in suppressing. Political activity by Federal employees is not such an inherently dangerous subject matter as to fall within the "clear and present danger" doctrine. On the contrary it is the cornerstone of our democratic form of government.

The legislative history of the Hatch Act shows that political activity of government workers carried on in their capacity as private citizens without abuse of authority is not an evil which the government has an interest in suppressing. Moreover, the wide scope of the prohibition on political activity of such government employees is not reasonably related to the end of suppressing improper political activities by such persons. The suppression of all such activity by those within a specific group of the population exceeds the constitutional powers of Congress. The United States Supreme Court has held that "the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." *DeJonge* v. *State of Oregon*, 299 U. S. 353, 364-365.

The power of the government to impose the limitations in Section 9(a) of the Hatch Act on political activity of employees is not enlarged by the fact that the government is the employer. The government as an employer enjoys no absolute power (*Ex parte Curtis*, 106 U. S. 371, 376). The government as employer may make reasonable regulations concerning Federal employment (*U. S.* v. *Thayer*, 209 U. S. 39, 42-43), but its power does not exceed the limits of reasonableness (*People* v. *Crain*, 214 U. Y. 154).

Although Federal employment be regarded as a privilege, the granting of the privilege or the withholding of it is nevertheless limited by the Constitution (*Pike* v. *Walker*, 73 App. D. C. 291, 121 F. (2d) 39; *U. S. ex rel. Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407, 430).

2. Whether the second sentence of Section 9(á) of the Hatch Act is repugnant to the Constitution on the ground that it imposes arbitrary and unreasonable restrictions upon Federal employees subject to its provision, in violation of the Fifth Amendment of the Constitution of the United States.

While unlike the Fourteenth Amendment, the Fifth Amendment does not expressly prohibit legislative action which denies the equal protection of the laws to any person, the Supreme Court has made it clear that the Fifth Amendment affords protection against congressional action which involves "discrimination of such an injurious character as to bring into operation the due process clause." *Curran v. Wallace*, 306 U. S. 1, 14; *Skinner v. Oklahoma*, 316 U. S. 315.

The statute exempts from the scope of the second sentence of Section 9(a), among others, the following: persons whose compensation is paid from the appropriation for the Office of the President, heads and assistant heads of executive departments, as well as employees of any educational institution supported in whole or in part by any state or subdivision thereof. These employees have the readiest access to official authority and power, yet under the Hatch Act they enjoy absolute freedom to engage in political activity. In substance, those with minimal authority, and hence least likely to coerce others when engaging in political activity, such as the plaintiffs in this action, are prohibited from engaging in it while those having the widest authority and hence potentially the widest coercive power, by virtue of their official positions, are not limited by this statute in their political activity.

3. Whether the second sentence of Section 9(a) of the Hatch Act is repugnant to the Constitution on the ground that it deprives the Federal employees subject to its terms of the fundamental right to engage in political activity reserved to the people by the Ninth and Tenth Amendments to the Constitution of the United States.

The present case does not involve the rights of the States as against the power of the Federal government. The conflict between the rights and powers reflected in this suit are

the rights reserved to the people as against both State and Federal power.

The right to organize a political movement to engage in political activity and in so doing to exercise the right of freedom of association, of assembly, of the press and of speech is a basic right of the American people. These guarantees are embodied in the Ninth and Tenth Amendments. The Ninth Amendment states specifically "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment reserves to the people the powers not delegated.

The States may not infringe upon such rights by unreasonable regulations (*Stromberg* v. *California*, 283 U. S. 259, 369). In that case Chief Justice Hughes said:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."

The Federal government is equally impotent to infringe upon such liberties by unreasonable regulation (*Palko* v. *Connecticut*, 302 U. S. 319).

The legal issues thus presented by the decision of the court below are substantial and their resolution involve not only the civil rights of the twelve individual plaintiffs in this action and of the numerous members of UFWA on whose behalf it brings suit, but it also vitally concerns the constitutional right of millions of Federal employees to participate fully in the democratic processes of government. Thus the millions of citizens subject to the prohibition of Section 9(a) of the Hatch Act by virtue of the fact that they are government employees are at the present time forbidden by that Act to take an active part in elections resolving issues of national and international significance, in which

these citizens employed by the government have the same vital interest which other citizens not so employed possess.

Opinion of the Court

A copy of the opinion of Justice Bailey on behalf of the statutory court, filed on August 4, 1944, is affixed hereto as "Exhibit B".

Conclusion

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court, and that substantial questions of widespread importance are involved, requiring review of the judgment of the statutory court in a full hearing on the merits.

Respectfully submitted,

LEE PRESSMAN,
Attorney for Plaintiff.

October 25, 1944.

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EXHIBIT "A"

FORM 1236
January 1944

UNITED STATES CIVIL SERVICE COMMISSION

POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS

OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

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POLITICAL ACTIVITY AND POLITICAL ASSESSMENTS OF FEDERAL OFFICEHOLDERS AND EMPLOYEES

I. GENERAL PROHIBITIONS

1. Civil-service rule I and the act of August 2, 1939 (as amended)—

Civil-service rule I, section 1, reads as follows:

No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns.

The act of August 2, 1939, as amended (U. S. Code, title 18, section 61), provides in part as follows:

It shall be unlawful for any person employed in any administrative position by the United States, or by any department, independent agency, or other agency of the United States (including any corporation controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof) * * *, to use his official authority for the purpose of interfering with or affecting the election or the nomination of any candidate for the Office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions (act of August 2, 1939, sec. 2, 53 Stat. 1147, as amended July 19, 1940, 54 Stat. 767).[1]

It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material,[2] shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President

[1] Penalty for violation of this section is a fine of not more than $1,000 or imprisonment for not more than 1 year, or both (act of August 2, 1939, sec. 8, 53 Stat. 1148).

[2] Title VII, Public Law 507, 77th Cong., approved March 27, 1942.

of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person (act of August 2, 1939, sec. 9, 53 Stat. 1148, as amended July 19, 1940, 54 Stat. 767).

For the purposes of this Act, persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States, except that for the purposes of the second sentence of section 9 (a) the Commissioners and the Recorder of Deeds of the District of Columbia shall not be deemed to be officers or employees (act of August 2, 1939, sec. 14 added July 19, 1940, 54 Stat. 767).

The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns (act of August 2, 1939, sec. 15 added July 19, 1940, 54 Stat. 767).

Nothing in sections 2, 9 (a), or 9 (b), or 12 of this Act shall be deemed to prohibit or to make unlawful the doing of any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization (act of August 2, 1939, sec. 21 added October 24, 1942, Public Law 754, 77th Cong.).

The rule and the statutes quoted above are general prohibitions against participation in politics by officers and employees of the Government. All officers and employees of the Government are, in addition, subject to a number of statutes relating to solicitation of political contributions, political coercion, political discrimination, and the purchase and sale of public office, which are set forth in sections of this publication.

Every Government employee is expected to be familiar with the statutes and the rules relating to political activity; ignorance does not excuse their violation. Each appointee to the classified service on entering on duty is required to sign a statement that he will familiarize himself with the rule and the laws relating to political activity.

II. JURISDICTION OF THE COMMISSION

2. **Federal employees.**—There is no language in the Hatch Act fixing responsibility for enforcement as to Federal employees. Thus, enforcement of section 9 as to these employees devolves upon the individual departments and independent establishments. However, it is important to note that civil-service rule I, which uses prohibitive language identical with that in the Hatch Act, is still in full force and effect as to employees in the competitive classified service. Indeed, subsequent to the passage of the Hatch Act this rule has been amended to conform with prohibitive language in section 9 of the Hatch Act, by Executive Order No. 8705, March 5, 1941, and promulgated anew. Thus, the Commission has jurisdiction to enforce the political-activity restrictions of the rule, and this jurisdiction, under an opinion of the Attorney General of the United States dated January 8, 1941, is concurrent with the statutory responsibility of the individual employing departments and independent establishments as to employees in the competitive classified service.

Prior to the passage of the Hatch Act, the Commission had authority to impose penalties for violations of the rule ranging from a reprimand or suspension to removal. The Attorney General held in the opinion referred to above that in cases where both the law and the civil service rule were violated the statutory penalty, which is removal from the service, is mandatory. The law definitely states with respect to Federal employees that a person found to have committed a violation must be immediately removed from the position or office held by him and must not be reemployed in such position or office (sec. 9 (b)).

Civil-service rule XV reads as follows:

Legal appointment necessary to compensation.—Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing (Executive Order No. 8705, March 5, 1941).

The General Accounting Office is without jurisdiction to review the determinations of the Civil Service Commission under rule XV and, upon certification by the Commission that an employee is holding a position in violation of the Civil Service Act and rules, the General Accounting Office has no alternative to withholding credit for payments made for salary or compensation (decision, Comptroller General, July 20, 1939, to the Postmaster General).

With respect to employees in nonclassified or excepted positions, the jurisdiction to determine whether or not there has been a violation of the Hatch Act is vested in the head of the department or independent establishment concerned with making the removal (opinion, Attorney General, July 22, 1940). However, this jurisdiction is limited by section 15 of the act to a determination of facts. Thus, the head of the department or independent establishment may decide whether or not an employee under his jurisdiction did in fact engage in certain activities. However, the question of whether such activities constitute a violation would, under the act, be determined by application of section 15, which provides that those activities are to be considered as in violation of the act which the Commission had theretofore determined were in violation of the civil-service rules prohibiting political activity.

3. **Civil Service Commission regulations.**—In taking action on alleged violations of section 1 of civil-service rule I, the Civil Service Commission proceeds under the following regulations:

(1) **Investigations.**—(*a*) Investigations of charges of political activity on the part of an officer or employee (both hereinafter comprehended within the term "employee") subject to the provisions of section 1, civil-service rule I, shall be conducted jointly by representatives of the Commission and of the department or agency where the individual is employed, unless either the Commission or the department or agency signifies that it will be unable to participate in the investigation. The Commission shall be notified of any complaint of political activity received by a department or agency and shall be given an opportunity to cooperate in any investigation that the department or agency may decide to make. Likewise, the Commission will not proceed with any investigation until the department or agency has been notified and has been given an opportunity to participate.

(*b*) During the course of the investigation the employee shall be afforded an opportunity to make a statement, either personally or in writing, before the investigator, and he shall be allowed to furnish names of witnesses who will support the statements he has made to the investigator.

(2) **Proposed order.**—When the Commission reaches the conclusion that a violation of section 1, civil-service rule I, has been established by the investigation, it shall issue a proposed order. This order, which shall include a statement of the charges against the employee and of the information in support thereof, shall be sent to the employee by registered mail, and he shall be allowed fifteen days from the date of service to respond thereto in writing. A copy of this order shall also be sent to the department or agency in which the individual is employed. With his reply to the proposed order, the employee may request a hearing as hereinafter provided.

(3) **Hearing.**—(*a*) The granting of a hearing shall not be a matter of right but shall be within the discretion of the Commission. No hearing shall be authorized in cases where the employee has admitted a violation or where a violation is established by indisputable record evidence.

(*b*) Hearings shall be held before a Hearing Examiner designated by the Commission and shall be at the Commission's office in Washington, D. C., unless the Commission shall order that the hearing be held elsewhere. All testimony shall

be under oath or affirmation. The employee may appear personally or by or with counsel. Counsel appearing shall have been admitted to practice before the Commission in accordance with rule 4 of the Rules of Practice under the act of August 2, 1939, as amended.

(c) The hearing shall be of the limited scope necessitated by the Commission's lack of the power of subpoena in proceedings under section 1, civil-service rule I. Because of the absence of that authority, it cannot undertake to conduct said hearing as a proceeding de novo, or to have evidence introduced therein in support of the charges against the respondent. Owing to the lack of subpoena power, evidence in support of charges must be limited to information given voluntarily. Such information is obtained upon an understanding of confidential treatment. Consequently, evidence supporting the charges cannot be introduced at the hearing. The hearing shall be unilateral, that is, it shall be only for the presentation of evidence on behalf of the employee in rebuttal of the charges disclosed by the proposed order. Counsel for the Commission may cross-examine witnesses.

(d) It shall be within the discretion of the Hearing Examiner to permit, and fix the time for, filing of briefs. The proceeding at the hearing will not be reported, unless the Commission shall so direct; but the employee shall have the privilege of himself having the evidence taken stenographically. If the proceeding is not taken by a reporter on behalf of the Commission, the employee and Commission counsel shall submit a summary thereof to the Hearing Examiner within a time fixed by him. Any disagreement concerning the contents of the summary shall be resolved by the Examiner, and the parties may file written exceptions. The summary and any exceptions shall be certified by the Hearing Examiner and shall become a part of the record.

(4) Final order.—(a) The Commission's final order shall be based on the entire record of the case, including the report of the investigation, the reply of the employee to the proposed order and in cases where a hearing has been granted, the report of the Hearing Examiner. If the employee does not reply to the proposed order within fifteen days from the date of service, final order shall be based on the report of investigation alone.

(b) The final order shall contain a statement of the charges that have been substantiated and shall prescribe the penalty to be imposed. It shall be served on the department or agency wherein the individual is employed, together with a copy to be forwarded to the respondent.

(5) Penalties.—(a) Since violations of section 1, civil-service rule I, are by law violations also of section 9 (a) of the Hatch Act, the penalty required by that act must of necessity be imposed. The employee must be immediately removed from the position or office held and may not again be employed in such position or office. If the appointing officer fails to carry out the instructions of the Commission within ten days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officer for proceedings in accordance with civil-service rule XV.

(b) When the Commission recommends the removal of an employee for a violation of section 1, civil-service rule I, and the Hatch Act, the penalty laid down in paragraph (a) of this section shall be applied, even where the department or agency reports that the individual has been removed on grounds other than a violation of section 1, civil-service rule I, and the Hatch Act, and the individual may not again be employed in the position from which he was removed. The

provisions of section 6 of these regulations regarding reinstatement in positions other than the one from which removal was effected shall also apply.

(c) The above procedure shall apply also where an employee has resigned from his position or office prior to the Commission's determination that he had violated section 1, civil-service rule I, and the Hatch Act.

(6) Reinstatement.—An employee removed for violation of section 1, civil-service rule I, may be reinstated, in accordance with the provisions of civil-service rule IX, in any position for which he can qualify other than the one from which he was removed: *Provided*, That the Commission shall in each case establish a period of time after removal, the length of which shall vary with the circumstances of the particular case, during which the reinstatement of the officer or employee to any position in the Federal service will not be approved.

III. APPLICABILITY OF THE RULE AND STATUTE

4. In general.—For many years employees in the competitive classified service have been prohibited from taking an active part in politics by civil-service rule I. In addition to this rule, such employees are now subject to the restrictions of the act of August 2, 1939. This is true regardless of whether the classified status was acquired through competitive examination, classification by statute, or classification by Executive order.

Only the first sentence of section 1, civil-service rule I, applies to employees in positions excepted from the competitive classified service. This sentence has been partially enacted in section 2 of the act of August 2, 1939, and violation of this provision of the statute constitutes a criminal offense.

Under section 9 (a) of the act of August 2, 1939, all persons employed in the executive branch of the Federal Government [*] whether or not such persons are in the classified service, are prohibited from using their official authority or influence for the purpose of interfering with an election or affecting the results thereof, and from taking an active part in political management or in political campaigns. It should be noted that by the terms of title VII of Public Law 507, 77th Cong. (Second War Powers Act, approved March 27, 1942), the restriction against taking any active part in political management or political campaigns does not apply in the case of "a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material." However, such employees are subject to the restriction which prohibits the use of official authority or influence for the purpose of interfering with an election or affecting the results thereof.

The Hatch Act expressly reserves to Government employees the right to vote and the right to express their opinions on all political

[*] Except (a) the President and Vice President of the United States; (b) persons whose compensation is paid from the appropriation for the office of the President; (c) heads and assistant heads of executive departments; (d) officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

subjects and candidates. This expression of opinion may be made publicly,* but it must not be such as to amount to taking an active part in an organized political campaign. The effect of section 9 (a) of the statute, therefore, is to place the same restrictions upon the political activities of all officers and employees of the executive branch of the Government, as section 1 of civil-service rule I places upon the political activities of employees in the classified service. Moreover, section 15 of the act expressly provides that the activities which are prohibited by the act are the activities which the Commission had theretofore determined were prohibited on the part of employees in the classified civil service by the provisions of the civil-service rules forbidding the taking of an active part in political management or in political campaigns.

5. **Substitute or part-time employees.**—Persons whose employment with the Federal Government is only part-time, or intermittent, not in any case occupying a substantial portion of the individual's time and not affording the employee's principal means of livelihood, are subject to the law while in an active-duty status, not otherwise. Under such conditions employees may hold public elective office or be listed as candidates for such office provided that they do not engage in political activity or political management during periods of active duty. The period of active duty embraces the whole period of status as a paid employee, rather than just the working hours of the day.

6. **Employees on leave.**—It is not permissible for an employee to take leave of absence for the purpose of working for a political committee or organization or of becoming a candidate for elective office with the understanding that he will resign his position if nominated or elected.

7. **Retired employees.**—Persons retired from public office or employment are not regarded as subject to the restrictions of the law. Such persons may engage in politics to the same extent as persons not connected with the public service.

However, in any case where an annuitant is reemployed in the executive branch of the Federal Government, the political-activity restrictions of the act would apply. In this connection it should be noted that the individual's annuity would be suspended by his reentry to the Federal service and he would necessarily be considered as a Federal employee subject to the same political-activity restrictions that are applicable to other employees in the executive branch of the Federal Government.

8. **Postmasters and post office employees.**—For many years the political activities of certain post office employees, such as rural carriers and fourth-class postmasters, were restricted by the terms of specific Executive orders. However, such employees, including all postmasters, are now subject to the political-activity restrictions of section 1 of civil service rule I and section 9 (a) of the Hatch Act.

9. **Star route and contract carriers—special-delivery messengers—clerks in third- and fourth-class post offices.**—It has been held that persons em-

* Opinion, Attorney General, January 8, 1941.

ployed in these positions are not employees of the United States within the meaning of the Hatch Act and that consequently the provisions thereof do not apply to them.

10. **Employees in the District of Columbia government.**—The Hatch Act specifically provides that for the purposes of the act persons employed in the government of the District of Columbia shall be deemed to be employed in the executive branch of the Government of the United States. Therefore, the political activities of such employees, with the exception of the Commissioners and the Recorder of Deeds of the District of Columbia, who are not subject to the restriction against taking any active part in political management or in political campaigns, are subject to the same restrictions as are applied to Federal officers and employees.

11. **Attorney General's decisions.**—In addition to the types of employees mentioned in the preceding paragraphs, Circular No. 3301 of the Attorney General's Office, dated October 26, 1939, lists the following officers and employees in the executive branch of the Federal Government as being affected by the provisions of section 9 of the Hatch Act:

(1) United States attorneys and marshals, their assistants and deputies.

(2) Special attorneys of the Department of Justice and special assistants to the Attorney General.

(3) Officers and employees of Governmental agencies, such as the Home Owners' Loan Corporation, the Reconstruction Finance Corporation, and the Public Works Administration.

(4) Officers and employees occupying administrative and supervisory positions in the Work Projects Administration, the National Youth Administration, and the Civilian Conservation Corps.

The same circular states that the act has been construed as not applying to the following:

(1) Officers and employees of the legislative branch of the Federal Government, including secretaries and clerks to Members of Congress and Congressional committees.

(2) Officers and employees of the judicial branch of the Federal Government, including United States commissioners, clerks of United States courts, referees in bankruptcy, and their secretaries, deputies, and clerks.

(3) Persons who are retained from time to time to perform special services on a fee basis and who take no oath of office, such as fee attorneys, inspectors, appraisers, and management brokers for the Home Owners' Loan Corporation, and special fee attorneys for the Reconstruction Finance Corporation.

(4) Persons who receive benefit payments, such as old-age assistance and unemployment compensation under the Social Security Act, rural rehabilitation grants, and payments under the agricultural-conservation program.

The Attorney General also ruled in an opinion to the Secretary of State, dated October 19, 1940 (39 Op. Atty. Gen. 508), that ambassadors and ministers were not prohibited from taking an active part in political campaigns.

IV. PROHIBITED ACTIVITIES*

12. **In general.**—In brief it may be said that the law is designed to prevent those subject to it from assuming general political leadership or from becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office. The following sections are devoted principally to a discussion of activities which had been decided by the Commission as prohibited by the civil-service rules prior to the enactment of section 15 of the Hatch Act, July 19, 1940.

13. **Activity by indirection.**—Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are, therefore, accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

This does not mean that an employee's husband or wife may not engage in politics independently, upon his or her own initiative, and in his or her own behalf. Thus, for example, the Commission has held that the wife of a Federal employee might serve as a member of a board of election officers, it being affirmatively shown that the husband was not involved in politics. Cases have arisen, however, in which the facts showed that the real purpose of a wife's activity was to accomplish a political act prohibited to her husband, the attempt being made for her husband's benefit and at his instigation or even upon his coercion. This may be true of individuals or it may occur among groups of employees' wives, associated for the purpose of securing for their husbands what the husbands may not secure for themselves. In such situations, it is obvious that the prohibitions against political activity are being violated. The collusion or coercion renders the wife's activity imputable to the husband, he being guilty of the same infraction as if he were openly a participant.

14. **Conventions.**—Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance merely as a spectator is permissible, but the employee so attending must not take any part in the convention or in the deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obtrusive demonstration or interference.

15. **Primaries—caucuses.**—An employee may attend a primary meeting, mass convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass this point in participating in its deliberations. He may not act as an officer of the meeting, con-

* All items under this heading are subject to the exceptions in section 18 of the Hatch Act. (See subsection 29, page 15.)

vention, or caucus, may not address, make motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

16. **Meetings.**—Service in preparing for, organizing or conducting a political meeting or rally, addressing such a meeting, or taking any part therein except as a spectator is prohibited.

17. **Committees.**—The holding of the office of Political Committeeman such as precinct committeeman, ward committeeman, etc., or service on or for any political committee or similar organization is prohibited. An employee may attend as a spectator any meeting of a political committee to which the general public is admitted but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether a classified employee may properly serve as a member. Assignment may be to duties which, if considered alone, would seem far removed from active politics but which, when considered as a part of the whole purpose, assume an active political character. Thus the Commission has forbidden a civil-service employee to serve as chairman of the food committee at an occasion signifying the opening campaign speech of a nominee for Governor of a State. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

18. **Clubs and organizations.**—Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances.

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

> That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service.

Membership in a labor union by employees subject to the Hatch Act is not prohibited, where the organization is nonpartisan in character and has as its primary object improvements in the conditions of labor

of its members and other matters related to their individual welfare. Thus, the Commission has held that employees subject to the Hatch Act may hold memberships in the Central Labor Union.

Likewise it has been held that matters concerned solely with organization and management of a union of Federal employees are not political management or political activity in violation of section 9 (a) of the Hatch Act, and that adoption of a resolution limited to these matters would not violate the law.

Section 9A of the act of August 2, 1939, provides as follows:

(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

Civil-service employees may hold office in organizations established for social betterment. It is pointed out, however, that in certain circumstances activities of such organizations may take on a character of partisan political activity. Employees who become members or officers of organizations of this type must take the responsibility for seeing that the activities in which they engage do not become political in character.

19. **Civic organizations and citizens' associations.**—Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, as amended, provided such activities have no connection with the campaigns of particular candidates or parties.

20. **Contributions.**—Employees may make voluntary contributions to a regularly constituted political organization for its general expenditures, subject to the limitation laid down in section 13 of the act. The term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make a contribution.

While employees may make contributions, they may not solicit, collect, receive, disburse, or otherwise handle contributions made for political purposes.

The Commission has held that voluntary contributions may be made at any time, even subsequent to a general election, so long as they are made to a regularly constituted political organization for its general expenditures.

In addition, sections 118 to 121 of the Criminal Code place certain restrictions on contributions by Federal employees. Contributions may not be handed over to another person in the Federal service; they may not be made in a Federal building; etc. For the text of these sections of the Criminal Code and further information on this matter, see

Parts VII, VIII and IX, pages 25 through 30. These sections of the Criminal Code are within the jurisdiction of the Department of Justice and the law provides severe penalties for violations.

21. **Expression of opinions.**—Although the act reserves to employees affected the right to "express their opinions on all political subjects and candidates," this reservation is subject to the prohibition that employees may not take any active part in political management or in political campaigns. Public expression of opinion in such a way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited.

An employee is not prohibited from wearing a political badge or button or displaying a political poster in the window of his home or on his automobile. However, it is regarded as a violation of the spirit of the law for a public servant to make a partisan display of any kind while on duty conducting the public business.

It should be remembered that employees are forbidden to become prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office. Thus, distribution of campaign literature, badges, or buttons is prohibited activity.

22. **Newspapers—publication of letters or articles.**—An employee may not publish or be connected editorially or managerially with any newspaper generally known as partisan from a political standpoint, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use.

The Commission has held that as a general rule a newspaper which is considered as being partisan from a political standpoint, either during the campaign or in the interval between campaigns, is regarded as being subject to application of the regulations against activity in connection therewith. It is not required that a publication be regarded as the organ of a political organization or that it have an official connection with any political organization or party. The terms "editorial and managerial" are intended to apply to responsibilities and duties which have to do with the making of decisions affecting the editorial policies. The objective behind the restriction on activity in connection with such publications or newspapers is prohibition of political activity of a partisan character through the medium of the public press by a person subject to the statute.

Whether or not ownership of stock or membership on a board of directors of a corporation which publishes a daily newspaper is a violation of the political-activity regulations will depend upon the degree to which the individual, by virtue of such ownership or membership, participates in controlling the editorial policy or news management of the publication. If a Federal employee makes decisions or assists in making decisions on editorial policy or news management with respect to the political status of the publication, a violation of

the regulations occurs, but mere ownership of stock would not of itself constitute a violation of the political-activity regulations.

There is no direct prohibition against correspondence work by an employee for newspapers. The employee will have the responsibility, however, of ascertaining that any material he submits is not in contravention of the regulations.

23. **Activity at the polls and for candidates.**—An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 2, sec. 250.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a National character. It is also a criminal offense to promise any employment, position, work, or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party.

An employee subject to the law must avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, or any other partisan political activities at the polls. Rendering partisan political service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of prohibited political activities. This is not intended to prohibit one subject to the act from transporting members of his immediate family to and from the polls, in view of the community of interest that exists in such cases. The foregoing provisions do not apply if the election in question is covered by the exceptions embodied in section 18 of the law of August 2, 1939, as amended. (See subsection 29, page 15.)

24. **Election officers.**—Service as an election officer of any kind, in which an individual's activities are such as to show partisanship or partisan political management, is prohibited.

25. **Parades.**—An employee may not participate in or help organize a political parade. An employee may be a member of a band or orchestra which takes part in parades or rallies provided such band or orchestra is generally available for hire as a musical organization.

26. **Petitions.**—The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridg-

ing the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any Committee or Member thereof, shall not be denied or interfered with."

An employee subject to the law of August 2, 1939, as amended, is permitted to sign petitions, including nominating petitions, as an individual, without reference to his connection with the Government, but he may *not* initiate them, or canvass for the signatures of others, if such petitions are identified with political management or political campaigns. Employees are permitted to exercise the right as individuals to sign a petition favoring a candidate for office, but they may not do so as Government employees or as a group or association of Government employees.

27. **Applying for Presidential positions not in the classified service.**—When a classified employee seeks promotion by appointment or transfer to a Presidential office not in the classified service, there is no objection to his becoming a candidate for such an office, provided the consent of his department is obtained, and provided he does not violate section 1 of rule I, prohibiting the use of his official authority or influence in political matters and provided further that he does not neglect his duty and avoids any action that would cause public scandal or semblance of coercion of his fellow employees or of those over whom he desires to be placed in the position he seeks.

A classified employee may circulate a petition or seek endorsements for his own appointment to a Presidential position, subject to the qualifications above stated, and he may, as an individual, sign a petition or recommend another person for such an appointment; but he may not circulate a petition, or solicit endorsements, recommendations, or support for the appointment of another person to such a position, whether such other person is a fellow employee or one not at the time in the Government service.

28. **Candidacy for public office.**—Candidacy for nomination or for election to a National, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy.

The Attorney General held in an opinion to the Secretary of the Interior dated April 17, 1940 (39 Op. Atty. Gen. 423), that the Hatch Act does not apply to the acceptance and holding of a local office to which an employee was elected without being a candidate, his name not appearing on the ballot but being written in by voters. However, the Commission interprets this opinion as applicable only in cases where the writing in of an employee's name is a spontaneous action on the part of the voters and does not come about as a result of pre-

arrangement whereby the employee was in effect a candidate before the vote was cast.

This decision is authority for the statement that the mere holding of a public office is not in itself a violation. (See also Attorney General's Circular No. 3301, October 26, 1939.)

However, it should be noted that membership on a political committee is not a public office within the meaning of the foregoing, even though held by election in the regular election as a political representative of a ward, precinct, county, or of the voting subdivision of a State. The holding of such political offices is prohibited.

V. ACTIVITIES MADE PERMISSIBLE BY THE DIRECT TERMS OF THE HATCH ACT AS AMENDED

29. **Nonpartisan local elections—Elections involving general questions.**—By the terms of section 18 of the Hatch Act as amended July 19, 1940 (54 Stat. 767), certain specific exceptions to the general prohibition against taking any active part in political management or in political campaigns are set forth. Section 18 reads as follows:

> Nothing in the second sentence of section 9 (a) or in the second sentence of section 12 (a) of this Act shall be construed to prevent or prohibit any person subject to the provisions of this Act from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party.

The purport of section 18 is to remove from the prohibitions of the law activity which may, in a sense, be political but which is of a strictly local character, the issues of the election in question and the personalities of the candidates as such being divorced entirely from State and National political parties.

Each case necessarily must stand or fall on the facts involved therein. Some examples of the cases which have been decided under this section follow:

> The appointment of a person subject to the act or the rule to a position on a school board for the purpose of serving out the term of a member who has resigned is permissible where it can be shown that the duties do not involve any political activity.
>
> Officers or employees subject to the act or the rule may be candidates for a local fire board, on facts showing that the positions are of a purely local nature and nonpolitical, not involving a partisan election, and held without compensation.

In the case of a proposed charter amendment to permit municipal regulation of bus lines, it was decided that activities in connection with such a general question are such as would come within the terms of section 18 of the act.

In all such cases, however, the holding of the positions must not interfere with the efficient discharge of the duties of the Federal office and of this question the head of the Federal employing department is the sole judge.

30. **Communities adjacent to the District of Columbia or communities the majority of whose voters are employees of the Federal Government.**—For many years permission had been granted to employees residing in certain municipalities located near the District of Columbia whereby such employees were permitted to be candidates for and to hold local office in the municipalities in which they resided. This permission, which was granted either by an individual Executive order or by the action of the Commission based on an Executive order, remained in full force and effect until the passage of the act of August 2, 1939, which prohibited active participation in political management or in political campaigns without exception. When this act was amended by the act of July 19, 1940, a new section was added (section 16, 54 Stat. 767) whereby the Commission was authorized to promulgate regulations extending the privilege of active participation in local political management and local political campaigns to Federal employees residing in any municipalities or other political subdivisions of the States of Maryland and Virginia in the immediate vicinity of the District of Columbia or in municipalities the majority of whose voters are employed by the Government of the United States. This section of the amended act reads as follows:

Whenever the United States Civil Service Commission determines that, by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this Act are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons.

The Commission has promulgated regulations governing the extension of the privileges set forth in the section quoted above and copies of these regulations are available upon request to the Commission's central office in Washington, D. C. Under these regulations it is necessary that a formal request be received from the representatives of the community involved and that the petitioners furnish certain specified information relative to their community and its elections. In all cases the final decision as to the extension of the privileges of section 16 to any individual municipality depends on

the municipality's meeting certain prerequisites which are set forth in the Commission's regulations.

The privileges allowed by section 16 have after full consideration been extended by formal action of the Commission to the following municipalities or political subdivisions:

In Maryland

Annapolis (minute of the Commission, May 16, 1941).
Bladensburg (minute of the Commission, April 20, 1942).
Brentwood (minute of the Commission, September 26, 1940).
Capitol Heights (minute of the Commission, November 12, 1940).
Cheverly (minute of the Commission, December 18, 1940).
Chevy Chase, sections 1 and 2 (minute of the Commission, March 4, 1941).
Chevy Chase, section 3 (minute of the Commission, October 8, 1940).
Chevy Chase, section 4 (minute of the Commission, October 2, 1940).
Martin's Additions 1, 2, 3, and 4 to Chevy Chase (minute of the Commission, February 13, 1941).
Chevy Chase View (minute of the Commission, February 26, 1941).
Cottage City (minute of the Commission, January 15, 1941).
District Heights (minute of the Commission, November 2, 1940).
Edmonston (minute of the Commission, October 24, 1940).
Fairmount Heights (minute of the Commission, October 24, 1940).
Garrett Park (minute of the Commission, October 2, 1940).
Glenarden (minute of the Commission, May 21, 1941).
Glen Echo (minute of the Commission, October 22, 1940).
Greenbelt (minute of the Commission, October 4, 1940).
Hyattsville (minute of the Commission, September 20, 1940).
Kensington (minute of the Commission, November 8, 1940).
Mount Rainier (minute of the Commission, November 22, 1940).
North Beach (minute of the Commission, September 20, 1940).
North Brentwood (minute of the Commission, May 6, 1941).
North Chevy Chase (minute of the Commission, July 22, 1942).
Northwest Park (minute of the Commission, February 17, 1943).
Riverdale (minute of the Commission, September 26, 1940).
Seat Pleasant (minute of the Commission, August 31, 1942).
Somerset (minute of the Commission, November 22, 1940).
Takoma Park (minute of the Commission, October 22, 1940).
University Park (minute of the Commission, January 18, 1941).
Washington Grove (minute of the Commission, April 5, 1941).

In Virginia

Alexandria (minute of the Commission, April 15, 1941).
Arlington County (minute of the Commission, September 9, 1940).
Clifton (minute of the Commission, July 14, 1941).
Falls Church (minute of the Commission, June 6, 1941).

The Commission's actions extending the privileges of active participation in local self-government of the above-listed communities

of Maryland and Virginia to resident Federal officers or employees are subject to the following restrictions:

(1) Federal officers and employees in the exercise of these privileges must not neglect their official duties and must not engage in nonlocal partisan political activities.

(2) Federal officers and employees must not run for local office as candidates representing a political party or become involved in political management in connection with the campaign of a party candidate for office.

(3) Federal officers and employees who are candidates for local elective office must run as independent candidates and must conduct their campaigns in a purely nonpartisan manner.

(4) Federal officers and employees elected or appointed to local offices requiring full-time service must resign their positions with the Federal Government. If elected or appointed to offices requiring only part-time service they may accept and hold the same without relinquishing their Federal employment provided the holding of such part-time office does not conflict or interfere with their duties as officers or employees of the Federal Government. The department or independent agency in which Federal officers or employees are employed is the sole judge of whether or not the holding of the local office conflicts or interferes with their official duties as officers or employees of the Federal Government.

(5) The permission granted by the Commission to any particular community may be suspended or withdrawn by the Commission when in its opinion the activities resulting therefrom are or may become detrimental to the public interest or inimical to the proper enforcement of the political-activity law and rules.

VI. FEDERAL OFFICERS OR EMPLOYEES HOLDING LOCAL OFFICE

31. **General statement.**—While the Hatch Act and the civil-service rule prohibit Federal employees from being candidates for local elective office except in the instances mentioned in section V, subsection 30 above, there also must be considered those instances in which a Federal officer or employee wishes to accept an *appointive* office under a State or local government or in which a State or local officeholder wishes to accept Federal employment and does not wish to relinquish his State or local office or position. In these latter instances the mere holding of the local office in the absence of facts showing partisan political activity would *not* constitute a violation of the Hatch Act; however, the terms of an Executive order which has been in effect since 1873 must be applied.

This order, which is dated January 17, 1873, generally prohibits persons holding Federal civil office by appointment from, at the same time, accepting or holding any office or position under the State, Territorial, or municipal government. There are certain specific exceptions to this general prohibition set forth in the original order and subsequent amending orders and it has been ruled that unless

a position or office is specifically listed as an exception, it must be viewed as within the prohibitions of the order of 1873 (25 Dec. Comp. Treas. 234). Also, there is in effect, during the period of the present national emergency, Executive Order No. 8516 of August 15, 1940, which suspends and makes inoperative the Executive order of January 17, 1873, insofar as the United States Civil Service Commission shall by regulation authorize appointments to positions directly concerned with the national defense. The Commission has by formal action under the authority of the Executive order of August 15, 1940, decided that the Executive order of January 17, 1873, is not to be applied to persons appointed *subsequent* to August 15, 1940, to positions declared by the Commission to be directly concerned with the national defense.

For further information relative to the Executive order of January 17, 1873, the Executive order of August 15, 1940, and other amending orders, see subsections 32 through 35. NOTE.—*These Executive orders are no longer effective insofar as they conflict with the political-activity restrictions of section 9 (a) of the Hatch Act and are not to be construed as permitting officers and employees in the executive branch of the Federal Government to become candidates for any elective office which is to be filled in an election involving candidates who are either directly or indirectly representing a political party.*

32. **Executive order of January 17, 1873.**—This order, which is in full force and effect as applied to Federal employees holding positions not directly concerned with the national defense and to persons appointed to the Federal service prior to August 15, 1940, reads as follows:

Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him or otherwise under the Constitution and laws of the United States while holding such Federal positions accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority:

And whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March, A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be taken to be and will be treated as a resignation by such

Federal officer of his commission or appointment in the service of the United States.

The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order and are excepted from its operation, and may be held by Federal officers.

The appointment of deputy marshals of the United States may be conferred upon sheriffs or deputy sheriffs. Any deputy postmasters, the emoluments of whose office do not exceed $600 per annum, are also excepted from the operation of this order and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmasters. Heads of departments and other officers of the Government who have the appointment of subordinate officers are required to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective departments or offices and as relates to the several persons holding appointments under them, respectively.

33. **Interpretation of the order of January 17, 1873.**—An Executive order of January 28, 1873, as amended by Executive order of August 27, 1933, is as follows:

Inquiries having been made from various quarters as to the application of the Executive order issued on the 17th of January relating to the holding of State or municipal offices by persons holding civil offices under the Federal Government, the President directs the following reply to be made:

It has been asked whether the order prohibits a Federal officer from holding also the office of an alderman or of a common councilman in a city, or of a town councilman of a town or village, or of appointments under city, town, or village governments. By some it has been suggested that there may be distinction made in case the office be with or without salary or compensation. The city or town offices of the description referred to, by whatever names they may be locally known, whether held by election or by appointment, and whether with or without salary or compensation, are of the class which the Executive order intends not to be held by persons holding Federal offices.

It has been asked whether the order prohibits Federal officers from holding positions on boards of education, school committees, public libraries, religious or eleemosynary institutions incorporated or established or sustained by State or municipal authority. Positions and service on such boards and committees, and professorships in colleges* are not regarded as "offices" within the contemplation of the Executive order, but as employments or service in which all good citizens may be engaged without incompatibility and in many cases without necessary interference with any position which they may hold under the Federal Government. Officers of the Federal Government may therefore engage in such service, provided the attention required by such employment does not interfere with the regular and efficient discharge of the duties of their office under the Federal Government. The head of the department under whom the Federal office is held will in all cases be the sole judge whether or not the employment does thus interfere.

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*Includes assistant professorships in a State college, assistant lectureships in an evening school of a municipal university, instructorships in a State college, and similar positions in State and municipal colleges and universities (minute of Commission, August 7, 1937).

The question has also been asked with regard to officers of the State militia. Congress having exercised the power conferred by the Constitution to provide for organizing the militia, which is liable to be called forth to be employed in the service of the United States, and is thus, in some sense, under the control of the General Government, and is, moreover, of the greatest value to the public, the Executive order of the 17th January is not considered as prohibiting Federal officers from being officers in the militia in the States and Territories.

It has been asked whether the order prohibits persons holding office under the Federal Government being members of local or municipal fire departments, also whether it applies to mechanics employed by the day in the armories, arsenals, and navy yards, etc., of the United States. Unpaid service in local or municipal fire departments is not regarded as an office within the intent of the Executive order, and may be performed by Federal officers, provided it does not interfere with the regular and efficient discharge of the duties of the Federal office, of which the head of the department under which the office is held will in each case be the judge.

Mechanics and laborers employed by the day in armories, arsenals, navy yards, etc., and master workmen and others who hold appointments from the Government or from any department, whether for a fixed time or at the pleasure of the appointing power, are embraced within the operation of the order.

34. **Executive order of August 15, 1940.**—This order, which suspends the prohibitions of the Executive order of January 17, 1873, as applied to certain national-defense appointments and appointees, reads as follows:

By virtue of and pursuant to the authority vested in me by section 1753 of the Revised Statutes of the United States (U. S. C., title 5, sec. 631) and as President of the United States, it is ordered that the Executive Order of January 17, 1873, as amended, prohibiting, with certain exceptions, Federal officers and employees from holding State, territorial and municipal offices, be, and it is hereby, suspended and made inoperative in so far as the United States Civil Service Commission, shall, by regulation, authorize appointments to positions directly concerned with national defense.

The Commission has promulgated the following regulations to govern the application of the above-quoted Executive order:

1. August 15, 1940, shall be considered as the effective date for application of Executive Order 8516 and therefore the prohibitions of the Executive order of January 17, 1873, shall not be applied to persons appointed subsequent to August 15, 1940, to positions directly concerned with the national defense.

2. Executive Order 8516 shall apply with equal force and effect to Federal officers or employees appointed subsequent to August 15, 1940, to State or local positions directly connected with national defense and to State or local officers or employees appointed subsequent to August 15, 1940, to Federal positions directly connected with national defense.

3. (a) All Federal positions, appointments to which are governed by the War Service Regulations, shall be considered positions directly connected with national defense.

(b) The applicability of Executive Order 8516 to State or local positions will be determined by the facts in each particular case.

4. Nothing in these regulations, nor in Executive Order 8516, shall be construed to permit the holding of a State or local position by a Federal officer or employee or the holding of a Federal position by an officer or employee of a State or local government, when such holding is prohibited by the rules or regulations of the department or agency wherein said officer or employee is employed, or when the duties of the State or local position will conflict or interfere with the individual's official duties as a Federal employee, provided that the employing department or agency will be considered as the sole judge in determining these factors.

5. The terms of Executive Order 8516 are subject to the general political activity restrictions of section 1 of Civil Service Rule I and the Hatch Act. Therefore the authority granted by the Executive order can in no way be construed as authorizing any person subject to such political activity restrictions to become a candidate for election or re-election to any public elective office which is to be filled in an election involving party candidates.

35. **Executive orders creating exceptions to the Executive order of January 17, 1873.**—Federal employees are again cautioned that the authority conferred by these orders is now subject to the general restrictions of the Hatch Act. Thus, these orders do *not* authorize Federal employees to be candidates for *any* elective office which is to be filled in an election involving party candidates for public office.

A brief summarization of these orders is as follows:

Employees of the Department of Agriculture.—Officers and employees of the Department of Agriculture are authorized to hold State and Territorial positions when such action is deemed necessary by the Secretary of Agriculture to secure a more efficient administration (Executive order of June 26, 1907).

Collectors of cotton statistics, Bureau of the Census.—State and county officials may be appointed special agents under the Bureau of the Census for the collection of cotton statistics (Executive order of August 4, 1909).

Moderators of town meetings.—The temporary office of moderator of a town meeting and offices of a like character are excepted from the operation of the order of January 17, 1873 (Executive order of August 24, 1912).

Employees of the Reclamation Service and the National Park Service.—Employees of the Reclamation Service and the National Park Service may, with the approval of the Secretary of the Interior, accept appointments as deputy State fish or game wardens, if no compensation is attached to the position (Executive order of July 9, 1914).

Lighthouse Service—Laborers.—Laborers in charge of lights in the Lighthouse Service are excepted from the operation of the order of January 17, 1873 (Executive order of October 6, 1915).[1]

Special agents, Department of Labor.—Persons holding State, Territorial, or municipal positions may be appointed as special agents when such action is deemed necessary by the Secretary of Labor to secure a more efficient administration of any law coming within the purview of the Department of Labor (Executive order of January 2, 1923).

Employees of the Veterans' Administration.—Officers and employees of the United States Veterans' Administration serving in a medical capacity and on a part-time basis may with the consent of the Administrator hold State, county, or

[1] The Lighthouse Service has been consolidated with the Coast Guard, Treasury Department.

municipal positions in which employed in a medical capacity. Officers and employees of the United States Veterans' Administration may with the consent of the Administrator accept appointments under State, county, or municipal authority as deputy sheriffs (Executive order of August 6, 1924).

Employees of the Alaska Railroad.—Employees of the Alaska Railroad, permanently residing in municipalities on the line of the railroad, are permitted to become candidates for and hold municipal office therein (Executive order of October 22, 1926).

Appointments in the Department of Commerce.—Persons holding State, Territorial, or municipal positions may receive, unless prohibited by law, appointments under the Department of Commerce when the Secretary of that Department deems such employment necessary to secure more efficient administration of the duties of his department (Executive order of July 3, 1931).

Officers of the Public Health Service.—Officers of the Public Health Service are permitted, upon recommendation of the Surgeon General of the Public Health Service, and the approval of the Secretary of the Treasury, to hold office in State, Territorial, or local health organizations, in order to cooperate with and aid State, Territorial, or local health departments; and State, Territorial, or local health officials or employees are permitted, unless prohibited by law, to hold office in the Public Health Service when the Surgeon General and the Secretary of the Treasury deem such employment necessary to secure a more efficient administration of the duties imposed upon the Public Health Service (Executive order of August 31, 1931).

Offices under municipalities of the Virgin Islands.—Membership in the Colonial Council of the Municipality of St. Thomas and St. John, or in the Colonial Council of the Municipality of St. Croix, Virgin Islands, being unremunerative positions, shall not be deemed disqualification for employment in the Federal service of the Virgin Islands, notwithstanding the Executive order of January 17, 1873, provided it does not interfere with the efficient discharge of the duties of the Federal position, of which the head of the department under which the position is held will be the judge (Executive order of February 27, 1933).

Employees of the National Park Service.—Employees of the National Park Service are permitted, with the approval of the Secretary of the Interior, to accept appointments as deputy sheriffs under the laws of the States or Territories in which such employees may be on duty: *Provided*, That their services as such deputy sheriffs shall be without compensation and shall not in any manner interfere or conflict with the performance of their duties as employees of the National Park Service (Executive order of April 3, 1936).

Medical officers, Indian Service.—Officers and employees of the Indian Service, Department of the Interior, serving in a medical or sanitary capacity, either on a part-time or full-time basis, may hold, with the consent of the Secretary of the Interior, State, county, or municipal positions of a similar character: *Provided*, That such services shall not in any manner interfere or conflict with the performance of their duties as officers or employees of the Indian Service: *And provided further*, That there shall be no additional compensation when the Federal officer or employee is carried on a full-time basis (Executive order of May 13, 1936).

District advisers in the Interior Department under the act of June 28, 1934.—State, county, or municipal officers, when duly elected by qualified voters of a grazing district, may be appointed by the Secretary of the Interior to serve as

district adviser under the act of June 28, 1934 (48 Stat. 1269), as amended by the act of July 14, 1939 (Public, No. 173, 76th Cong.), for intermittent duty, when the Secretary of the Interior deems such services necessary in the interest of grazing on public lands (Executive order of June 17, 1937).

Immigration inspector, Department of Labor, Virgin Islands.—Officers and employees of the Municipalities of St. Thomas and St. John or of the Municipality of St. Croix, Virgin Islands, may be appointed to the position of immigration inspector for the Virgin Islands (Executive order of November 6, 1937).

Employees of the Interior Department.—Officers and employees of the Interior Department, upon approval of the Secretary of the Interior, may hold office under State, Territorial, and municipal governments engaged in cooperative and related work with the Department, provided that the services to be performed pertain to such work and do not interfere with the performance of the Federal duties. State, Territorial, and municipal employees engaged in cooperative and related work with the Interior Department may be appointed in the Department of the Interior when the Secretary deems such employment necessary to secure more efficient administration of said work. Appointments of such officers and employees to positions subject to the civil-service laws must be made in accordance with such laws (Executive order of January 21, 1938).

Employees of the United States Marshal for the Virgin Islands.—Any officer or employee of the police or prison departments of the Territorial and municipal governments of the Virgin Islands may be appointed to the position of deputy or any other position in the office of the United States Marshal for the Virgin Islands (Executive order of May 24, 1938).

Employees of the Division of Grazing, Department of the Interior.—Employees of the Division of Grazing of the Department of the Interior, with the approval of the Secretary, may accept appointment as deputy fire warden, deputy fish warden, or deputy game warden under the States in which such employees may be on duty, provided that their services in the State position are without compensation and do not interfere with the performance of the duties of the Federal position (Executive order of August 4, 1938).

School teachers and instructors.—Officers and employees of the Federal Government may hold positions as teachers or instructors in any State, Territorial, or municipal school or university, provided that their holding of such position shall not in any manner interfere or conflict with the performance of their duties during their regular hours of duty as officers or employees of the Federal Government (Executive order of April 11, 1940).

Utilization of services of State and local officers.—The heads of a number of Federal agencies are authorized by specific statutes to employ the services of State and local officers.

Employees residing in municipalities near the District of Columbia.—Special permission has been granted to employees residing in municipalities near the District of Columbia to hold local municipal office by the Executive order of February 14, 1912. However, the scope of such permission was restricted by the act of August 2, 1939, which prohibited active participation in political management or in political campaigns. When this act was amended July 19, 1940, provision was made for the reextension of these privileges. (See section 30, pages 16 through 18.)

VII. STATUTES RELATING TO POLITICAL ASSESSMENTS, POLITICAL COERCION AND DISCRIMINATION, AND THE PURCHASE AND SALE OF PUBLIC OFFICE

36. In addition to the restrictions of the act of August 2, 1939 (as amended), civil-service rules, Executive orders, and departmental regulations, the freedom of officers and employees of the executive civil service to engage in politics is limited further by a number of statutes. These statutes are generally applicable to all officers and employees of the United States, whether or not in the classified service, and, in some cases, the language of the statute is sufficiently broad to include any person receiving compensation for services from money derived from the Treasury of the United States, and other persons. These statutes are set forth in the following sections. Some of the activities prohibited under penalty of fine and imprisonment are:

1. Solicitation or receipt of political contributions by one officer or employee from another.
2. The giving or handing over of a political contribution by one employee to another.
3. Solicitation or receipt of political contributions in a Federal building by any person, whether or not an employee of the Government.
4. Solicitation or receipt by any person of political contributions from any person receiving any benefit under any act of Congress appropriating funds for relief.
5. Solicitation or receipt of any thing of value, either for personal reward or as a political contribution, in return for the promise to use, or the use of, influence to secure an appointive office under the United States.
6. Payment or the offer of payment for the use of influence in securing an appointive office under the United States.
7. Promising employment, compensation, or other benefit made possible by act of Congress as consideration or reward for political activity.
8. Discrimination by an officer or employee in favor of, or against another officer or employee on account of political contributions.
9. Depriving any person on account of race, creed, color, or political activity, of compensation or other benefit made possible by any act of Congress appropriating funds for relief.
10. Disclosure for political purposes of any list or names of persons receiving benefits under an act of Congress appropriating funds for relief and the receipt of such a list or names for political purposes.

VIII. POLITICAL ASSESSMENTS

37. **Solicitation or receipt of political contributions from Federal employees.**—The United States Code, title 18, section 208 (Criminal Code, sec. 118, as amended), provides as follows:

It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or em-

ployee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

Section 5 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61d), reads as follows:

It shall be unlawful for any person to solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political purpose whatever from any person known by him to be entitled to or receiving compensation, employment, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes.*

38. **Circulars of solicitation bearing names of Federal employees.**—In an opinion of October 17, 1902 (24 Op. 133), the Attorney General held that the sending of a circular letter by a political committee to Federal officers and employees soliciting financial aid in Congressional or State elections, upon or attached to which appear the names of Federal officers or employees, is a violation of section 11 of the Civil Service Act (now sec. 118 of the Criminal Code), which declares that no officer or employee of the Government shall be in any manner concerned in soliciting or receiving any assessment or contribution for any political purpose whatever from any officer or employee of the United States. The statute unquestionably condemns all such circulars, notwithstanding the particular form of words adopted, in order to show a request rather than a demand, and to give the responses a quasi-voluntary character.

39. **"Political assessments" defined.**—The following is an extract from the decision in *United States* v. *Scott* (74 Fed., 213), in the Circuit Court of the District of Kentucky, rendered October 7, 1895, by Taft, J.:

To charge a man with soliciting a contribution from United States officers for a political purpose carries with it by implication a charge that the accused knew the purpose for which the contribution was solicited. The words "for a political purpose" may reasonably be construed to qualify not only the contribution but the solicitation. Similarly, to charge that a man received from another his contribution for a political purpose, by implication charges that the reception was for the same purpose as the contribution. * * * Nor was it necessary to set out the specific averment that the defendant knew that the persons from whom the contributions were received were officers of the United States.

The following extract is from the decision rendered by McCall, J., in the case of *United States* v. *Dutro, L. W.*, 1913, Western District of Tennessee (unreported):

* The statute under which the indictment was found prohibits (and I shall speak of this concrete case) the postmaster at Memphis, Tenn., from receiving,

* Under section 8 of the act penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

or being in any manner concerned in receiving, any assessment, subscription, or contribution for any political purpose whatever from any official, clerk, or employee of the United States.

There are four counts in the indictment. Two of them charge the defendant with receiving subscriptions and contributions for political purposes from an officer, clerk, or employee of the United States, and two of them charge defendant with being concerned in receiving such assessment or subscription for political purposes from a clerk or employee of the United States.

Evidently one of the purposes of Congress in enacting the legislation was to prohibit superior officers from bringing pressure to bear upon their subordinates in order to secure contributions for campaign purposes, and the act is couched in very broad terms.

This evidence (which so far is uncontradicted) shows that the defendant, Mr. Dutro, did receive two contributions for campaign purposes from an officer or clerk or employee of the United States. Whatever may have been Mr. Dutro's frame of mind in regard to his connection with it, the one fact remains, as the evidence shows, that he received these contributions for the purposes and from the parties which the law prohibits. Perhaps and no doubt he did so without any thought that he was violating any statute, and felt that he was acting purely as a conveyor of these contributions to the political parties for whom they were intended, to accommodate those who were making the contributions, and purely as a personal matter, but I think under the evidence his action was in violation of the statute.

The other two counts, as I have pointed out, charge the defendant with being concerned in receiving assessments, subscriptions, or contributions for campaign purposes from a clerk, employee, or officer of the United States. There is a controversy here between counsel as to what the word "concerned" means. From what the law books say which have been read here, and from my own impression, it seems that the word "concerned" means to be interested in, or take part in, receiving such contributions. If Mr. Dutro, by his connection with these two subscriptions, took a part in the contributions being made by employees of the Government for campaign purposes, he would be guilty. I think the natural construction of the phrase or term or word necessarily leads to the conclusion that he did take a part in receiving the contributions, because he received and conveyed them from the contributors to the parties for whom they were intended, and, as the proof so far shows, he knew that the parties who were making the contributions were clerks under him in the Post Office Department, and he knew the purpose for which the money was to be used and where it was to go.

The foregoing case definitely establishes the principle that an employee of the Government who receives a political contribution from another such employee as a mere agent or messenger for the purpose of turning it over to a political organization commits a violation of the statute.

40. **Solicitation or receipt of political contribution in Federal buildings.**—The United States Code, title 18, section 209 (Criminal Code, sec. 119), provides that—

No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208

of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

41. **Letters addressed to Federal buildings.**—The Commission by a minute of March 23, 1897, held that addressing a letter to a Government employee in a Government building soliciting political contributions is a solicitation in that building within the meaning of section 12 of the Civil Service Act, but notwithstanding numerous violations no opportunity arose of having the question judicially determined until 1907, when an indictment was obtained against Edward S. Thayer at Dallas, Texas. A demurrer to the indictment was sustained on the ground that the act required the personal presence in the Government building of the solicitor. Appeal was taken to the Supreme Court, and the judgment of the lower court was reversed. (*United States* v. *Thayer*, 209 U. S. 39.) The opinion of the Court, delivered by Justice Holmes on March 9, 1908, establishes definitely the proposition that solicitation by letter or circular addressed to and delivered by mail or otherwise to an officer or employee of the United States at the office or building in which he is employed in the discharge of his official duties is a solicitation "in a room or building" within the meaning of this section, the solicitation taking place where the letter was received. (See also *United States* v. *Smith*, 163 Fed., 926, where the letter was personally delivered.)

42. **Letters delivered in Federal buildings.**—The Commission holds that the sending through the mails of letters to Government employees soliciting political contributions, their street or home address being omitted from the envelopes, with the result that the letters are delivered by the postal authorities in the Government building in which they are employed, constitutes a violation of this section. It is a maxim of the law that a person is presumed to intend the natural and probable consequences of his acts, and failure or omission to take measures to avoid delivery of such letters in a Government building will render the offender liable to prosecution.

43. **Discrimination on account of political contributions.**—The United States Code, title 18, section 210 (Criminal Code, sec. 120), provides as follows:

> No officer or employee of the United States mentioned in section 208 of this title shall discharge or promote or degrade or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

(See also sec. 52 herein.)

44. **Payment of political contributions by one employee to another.**—The United States Code, title 18, section 211 (Criminal Code, sec. 121), provides as follows:

> No officer, clerk, or other person in the service of the United States shall directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate

to Congress or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

45. **Penalties for assessments.**—The United States Code, title 18, section 212 (Criminal Code, sec. 122), provides that—

Whoever shall violate any provision of sections 208 to 211 of this title shall be fined not more than $5,000 or imprisoned not more than 3 years, or both.

46. **Foregoing offenses declared felonies.**—By section 15 of the Civil Service Act it was declared that persons violating any provisions of the four preceding sections should be guilty of a misdemeanor, but this section is now superseded by section 122 of the Criminal Code, above quoted, which makes such violation a felony in view of the following provision of section 335 of the Criminal Code (U. S. C., title 18, sec. 541):

All offenses which may be punished by death or imprisonment for a term exceeding 1 year shall be deemed felonies. All other offenses shall be deemed misdemeanors.

IX. PURCHASE AND SALE OF PUBLIC OFFICE

47. **Payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 149, provides as follows:

It shall be unlawful to pay or offer or promise to pay any sum of money, or any other thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence, whatsoever, to procure any appointive office under the Government of the United States for any person whatsoever.

48. **Receiving payment for influence in procuring appointive public office prohibited.**—The United States Code, title 18, section 150, provides as follows:

It shall be unlawful to solicit or receive from anyone, whatsoever, either as a political contribution, or for personal emolument, any sum of money or thing of value, whatsoever, in consideration of the promise of support, or use of influence, or for the support or influence of the payee, in behalf of the person paying the money, or any other person, in obtaining any appointive office under the Government of the United States.

49. **Punishment for violation.**—The United States Code, title 18, section 151, provides:

Anyone convicted of violating sections 149 and 150 of this title shall be punished by imprisonment of not more than 1 year, or by a fine of not more than $1,000, or by both such fine and imprisonment.

50. **Promising benefits for political activity.**—Section 3 of the act of August 2, 1939, 53 Stat. 1147, (U. S. Code, title 18, section 61b), reads:

It shall be unlawful for any person, directly or indirectly to promise any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any act of Congress, to any person as

consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election.*

X. POLITICAL COERCION

51. Section 2, clause second, of the Civil Service Act directs that the civil-service rules "shall provide and declare as nearly as the conditions of good administration will warrant, as follows: * * * Sixth. That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." In pursuance of this section, civil-service rule I, section 1, provides, in part, that "No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof." This provision applies to all persons in the executive civil service, nonclassified as well as classified, and is held to prohibit a superior officer from requesting or requiring the rendition of any political service or the performance of political work of any sort by subordinates.

Section 1 of the act of August 2, 1939, 53 Stat. 1147 (U. S. Code, title 18, section 61), reads as follows:

That it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, or Member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, a Presidential elector, or any Member of the Senate or any Member of the House of Representatives, Delegates or Commissioners from the Territories and insular possessions.*

Section 7 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61f), reads:

No part of any appropriation made by any act, heretofore or hereafter enacted, making appropriations for work relief, relief, or otherwise to increase employment by providing loans and grants for public-works projects, shall be used for the purpose of, and no authority conferred by any such act upon any person shall be exercised or administered for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.*

XI. POLITICAL DISCRIMINATION

52. Failure to contribute or render political service not prejudicial.—Section 2, clause second, of the Civil Service Act reads:

* Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

Fifth. That no person in the public service is for that reason under any obligations to contribute to any political fund or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Section 4 of the act of August 2, 1939, 53 Stat. 1147 (U. S. Code, title 18, section 61c), reads as follows:

It shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes, on account of race, creed, color, or any political activity, support of, or opposition to any candidate or any political party in any election."

53. No disclosure as to opinions or affiliations.—Section 2 of rule I provides as follows:

No disclosure or discriminations.—No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law.

54. Definition of discrimination.—Political discrimination consists in giving appointment, promotion, or any other favor to an appointee, eligible, or candidate because of his politics, or withholding appointment, promotion, or any other favor from an appointee, eligible, or candidate because of his politics. An appointing officer who appoints or refuses to appoint an applicant because the applicant does or does not entertain certain political opinions, who makes any inquiry of the applicant or any other person as to the applicant's political opinions or affiliations, or reduces an employee because that employee refuses to render political service, to be coerced in political action, or to contribute money for political purposes, or who advances or promotes an employee for opposite reasons, violates the Civil Service Act and rules.

XII. POLITICAL RECOMMENDATION

55. Senators and Representatives.—Section 10 of the Civil Service Act provides:

That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or Member of the House of Representatives, except as to the character or residence of the

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* Under sec. 8 of the act, penalty for violation of this section is fine of not more than $1,000, imprisonment for not more than 1 year, or both.

applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

56. **Disclosing politics.**—Rule I, section 3, provides as follows:

No recommendation of an applicant, eligible, or employee in the classified service involving disclosure of his political or religious opinions or affiliations shall be considered or filed by the Civil Service Commission * * * or by any officer concerned in making appointments or promotions.

57. **Letters disclosing politics not to be considered.**—It is the duty of officers concerned in making appointments or promotions to refuse to receive or consider letters disclosing the politics or religion of an applicant, eligible, or employee and to explain to the writers that communications based upon such grounds will not receive attention or be filed.

58. **Recommendation for promotion.**—Rule XI, section 3, provides that—

No recommendation for promotion except in the regular form of periodical service-rating reports or unless it be made by the person or persons under whose supervision such employee has served shall be considered by any officer concerned in making promotions. Recommendation in any other form or by any other person, if made with the knowledge and consent of the employee, shall be sufficient cause for debarring him from the promotion proposed, and a repetition of the offense shall be sufficient cause for removing him from the service.

59. **Disclosure of names for political purposes.**—Section 6 of the act of August 2, 1939, 53 Stat. 1148 (U. S. Code, title 18, section 61e), reads:

It shall be unlawful for any person for political purposes to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment, or benefits provided for or made possible by any act of Congress appropriating, or authorizing the appropriation of, funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee, or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes.[21]

[21] The penalty for violation of this section is a fine of not more than $1,000, imprisonment for not more than 1 year, or both.

EXHIBIT "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 24007

Filed Aug. 4, 1944. Charles E. Stewart, Clerk.

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), et al., *Plaintiffs,*

v.

HARRY B. MITCHELL, et al., *Defendants*

Before Groner, Chief Justice, United States Court of Appeals, District of Columbia; and Bailey and Morris, Associate Justices, District Court of the United States for the District of Columbia, sitting as a statutory three-judge court.

BAILEY, J.:

This is an action brought to declare invalid, as in contravention of the Constitution of the United States, the second sentence of Section 9 (a) of the Act of August 2, 1939, as amended, popularly known as the Hatch Act (U. S. C. 61 h (a); 53 Stat. 1147, 1148; 54 Stat. 767; 56 Stat. 181), and to enjoin the defendants, members of the United States Civil Service Commission "from enforcing, threatening to enforce, or otherwise acting" pursuant to that provision. Defendants have moved to dismiss the action and for summary judgment, the motion being accompanied by affidavit.

The following are the pertinent statutes and regulations:

Section 9(a) of the Hatch Act is as follows:

"It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No

officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term 'officer' or 'employee' shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Natioin-wde administration of Federal Laws."

Section 9 (b) of the Hatch Act is as follows:

"Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person."

Section 15 of the Hatch Act is as follows:

"The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on

the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." (18 U.S.C. 610; 54 Stat. 767).

Section 18 of the Hatch Act is as follows:

"Nothing in the second sentence of section 9 (a) * * * shall be construed to prevent or prohibit any person subject to the provisions of this subchapter from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party." (18 U.S.C. 61 r; 54 Stat. 767).

Revised Statutes Section 1753 (5 U.S.C. 631) contains the following provision:

"The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter * * * and may * * * establish regulations for the conduct of persons who may receive appointments in the civil service."

In the exercise of power conferred by R. S. Section 1753, and by the Civil Service Act, the President has promulgated

a number of Civil Service Rules. Civil Service Rule I is as follows:

> "No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns." (5 C.F.R. 1943 Cum. Supp., 1.1).

Civil Service Rule XV is as follows:

> "Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or Rules, or of any Executive Order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing." (Executive Order No. 8705, March 5, 1941) (5 C.F.R. 1943 Cum. Supp., 15.1).

This action is brought by the United Federal Workers of America, an unincorporated labor union composed of employees of the United States Government, and 12 individual plaintiffs, each of whom occupies a position in the Federal government under the classified civil service. The defendants are the duly appointed and acting members of the United States Civil Service Commission.

The plaintiff union asserts that it has "an interest in protecting and restoring the rights of its membership" and that it brings this action "as a representative of, and on behalf of, all of its members, including those who have not specifically joined in suing individually, who are subject to the provisions of the second sentence of Section 9 (a) of the Hatch Act."

The plaintiffs charge that if they engage in the activities forbidden by Section 9 (a) of the Hatch Act the defendants will cause them to be dismissed; that plaintiff Poole has already conducted political activities in violation of said Section 9 (a), and that the defendants have already commenced proceedings for his dismissal from the employ of the United States.

The defendants contend that neither plaintiff union nor the individual plaintiffs can maintain this action; that it is not claimed that the union is prevented from engaging in any political activity; that a union does not stand in a position where it can assert the individual rights of its members; that the plaintiffs, other than Poole, have only hypothetical issues, and that they are not hurt because they have done nothing in violation of the Act.

Whether or not the union can maintain this action in a representative capacity the individual plaintiffs are in a different situation. The mere existence of the statute, saying that they shall not engage in political activity, the penalty in the statute that they shall be dismissed if they do, and the warning addressed to them by the Civil Service Commission in their posters certainly prevent them from engaging in such activity, if the statute is constitutional. If the statute is unconstitutional, they are being prevented from things which they have the right to do. If the statute is constitutional, it is mandatory that they be dismissed for doing such things. As to the plaintiff Poole, he has done the things denounced by the statute. If the Act is valid, dismissal is mandatory. There is no need for him to follow further administrative procedures. The provisions of Civil Service Rule XV that in case of any violation of the Civil Service Act or Rules or of any Executive Order or any regulation of the Commission the Commission shall certify

the facts to the proper appointing officer with specific instructions as to discipline or dismissal is now controlled by the provisions of the Hatch Act that in case of violation of Section 9 (a) of that Act, dismissal is mandatory.

We are of the opinion, therefore, that the individual plaintiffs have such an interest as to give them the right to maintain this suit.

The defendants further contend that the Civil Service Commission has no responsibility under the law to enforce the Hatch Act, and, therefore, no action can be maintained against them (except as to their own employees, of whom none are parties in this case) in which the constitutionality of the Hatch Act can be determined. It is true that the Hatch Act does not specifically charge the Civil Service Commission with the enforcement of the particular provision here involved. The situation is this: Revised Statutes, Section 1753 (5 U.S.C. 631) authorizes the President to prescribe regulations for the conduct of persons who may receive appointments in the Civil Service. Pursuant to that authority, Rule I, Section 1, was promulgated by Executive Order, providing, among other things:

> "Persons who by the provisions of these rules are in competitive classified service, while retaining the right to vote as they please and to express *privately* their opinions on all political subjects, shall take no active part in political management or in political campaigns."

By Rule XV, it is provided that, if the Commission finds that any person is holding a position in violation of the Civil Service Act, or the rules promulgated thereunder, or in violation of any Executive Order, or any regulations of the Commission, or that any employee subject to such act, rules, orders, or regulations is taking active part in political management or political campaigns, after notice to the person affected and opportunity for explanation, it shall certify the facts to the proper appointing officer with specific recommendation for *discipline or dismissal*. In the event of any continued violation for ten days after such recommendation, the Commission shall certify the facts to the

proper disbursing and auditing officers, and such officers shall not pay or allow the salary or wages of such person thereafter accruing.

The second sentence of the above-quoted Section 9 (a) of the Hatch Act provides:

> "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material; shall take any active part in political management or in political campaigns."

It is this sentence which the plaintiffs claim to be unconstitutional.

It will be seen that the Congress here applies to all governmental employees, except those expressly excepted, the same rule of conduct respecting active participation in political campaigns and management as that which had theretofore applied only to Civil Service classified employees, with the exception that the word "privately" in the former Civil Service Rule was eliminated. It will also be observed that the penalty for such action is dismissal rather than as had theretofore in the Civil Service Rules been discipline or dismissal. It is significant that, after the enactment of the Hatch Act, the Civil Service Commission Rule I was altered to bring it into conformity with that Act by also eliminating the word "privately," and this was done, as stated in the Commission's brief, at page 15.

> "As a matter of fact, rather than Civil Service Rules I and XV being incorporated into the Hatch Act, the Hatch Act has compelled changes in the Rules."

It is true that there is no statement in the Hatch Act that Rule I of the Civil Service Commission is incorporated in Section 9 (a), but it is also true that the very words of that rule, with the exception of the word "privately," are the words of Section 9 (a). It has been recognized by the Ex-

ecutive Departments, pursuant to an opinion of the Attorney General, dated June 8, 1941, that by virtue of the Hatch Act the penalty for all employees, both classified and those not classified, is dismissal and not as theretofore provided respecting classified employees in Rule XV of the Civil Service Commission discipline or dismissal. It is argued by the Commission in its brief that the enforcement of the Hatch Act in this regard lies with the appointing authority having jurisdiction of the particular employee, namely, the head of a department or independent agency. This seems to be in accordance with the broad language in an opinion of the Attorney General, dated July 22, 1940 (39 Opinions of Attorney General 462). It will be noted that this opinion was prior to the Opinion of the Attorney General, first above referred to, and it will also be noted that there is no discussion of any difference of enforcement as to classified employees and those not classified.

Our conclusion is that the Congress moved into the field which had previously only been partially occupied by the rules of the Civil Service Commission, and which were applicable only to classified employees; that the Congress superseded the rules insofar as conduct is concerned, and made such rules applicable alike to both classified and unclassified employees; that Congress left the matter of enforcement of such rules of conduct where it found it, namely, that the Civil Service Commission, under rules of conduct which must be brought into accord with the Act of Congress, still retain the duty to enforce the proper penalty with respect to classified employees as they had theretofore had the power to do; and that the appointing authorities, namely, the heads of departments and independent agencies, who before the enactment of the Hatch Act were responsible for disciplinary measures, including dismissal, of employees not classified, remain charged with the duty of enforcement of such discipline, including dismissal, only they are required to apply the rules of conduct and disciplinary measures set forth in the Hatch Act. Viewed in this light, it seems clear that the Hatch Act, insofar as it is here involved, determines what the rules of the Civil Service Commission should be and what disciplinary penalties should be imposed upon a classified employee without

disturbing the existing authority of the Commission to visit such punishment upon a classified employee. If this be so, the individual plaintiffs in this cause and the Civil Service Commission have a very real concern and controversy as to the validity of the provisions of the Hatch Act here involved. We hold, therefore, that this suit is properly brought against the defendants.

Plaintiffs claim that the second sentence of Section 9 (a) of the Hatch Act is unconstitutional in that it violates fundamental rights of the plaintiffs guaranteed by the First Amendment to the Constitution, providing that "Congress shall make no law abridging * * * freedom of speech, or of the press, or of the right of the people peaceably to assemble" and that it deprives plaintiffs of liberty and property without due process of law in violation of the Fifth Amendment to the Constitution, and that it disparages and denies to the plaintiffs fundamental right to engage in political activity reserved to the people by the Ninth and Tenth Amendments.

From the earliest times there have been certain restrictions respecting those who hold office or employment in the Government. President Jefferson in 1801 made the following order:

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments. Freedom of elections being essential to the mutual independence of governments and of the different branches of the same government, so vitally cherished by most of our constitutions, it is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am instructed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall

it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.

There has been a strong development toward safeguarding employees of the Government from insecurity attributable to political affiliation. While that has been accomplished to a much greater degree with respect to those occupying classified positions under the Civil Service, there is, nonetheless, a definite objective toward securing and keeping employees not in the classified service on the basis of merit rather than because of political activities on their part. As the Hatch Act has sought to extend to those latter much of the same protection theretofore afforded to classified employees, so it has imposed upon them the same restrictions heretofore recognized to be proper respecting classified employees. And in the instant discussion it is not to be lost sight of that the individual plaintiffs are all classified employees. The legislation hereunder consideration does not seek to take away from a Government employee his right to vote, nor his right to express his opinion on all political subjects. It does undertake to preclude him from taking any active part in political management, or in political campaigns, and by that is meant activities particularly defined by the Civil Service Commission (Section 15 of the Hatch Act). In the debates leading up to the passage of the Hatch Act much was said about the limitation on the constitutional rights of those employees who were made subject to the Act. Most that was said was by those who considered the legislation to be an infringement of such rights. There can, therefore, be no doubt that it was the considered judgment of the Congress and of the President that the legislation was not such an infringement.

To say that the Congress has not the power to pass this legislation in the public interest, and in the interest of the employees of the Government whose tenure it is seeking to protect, is to say that it is not rational for the Congress to conclude that it cannot take political activity out of the employment, promotion and dismissal of Government em-

ployees without at the same time taking Government employees out of political activity. This is a question for the Congress, and not the courts, to decide.

The plaintiffs challenge the legislation as being unreasonably discriminatory between the employees who come within the Act and certain employees excepted therefrom. First, the employees covered by the Act as compared with persons whose compensation is paid from appropriation for the office of the President, heads and assistant heads of Executive Departments, officers who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relation with foreign powers, or in the Nation-wide administration of Federal laws. It is perfectly obvious that these classes of employees are in very large measure political. No one supposes that they would not change with the changing of administrations. There is no need nor desire to protect them from political activity, and hence there is no corresponding occasion to restrict such activity on their part.

Section 18 of the Act provides that political activity shall not include certain elections where there are no candidates of a party whose electors have been voted for in a presidential election, nor an election in connection with any question which is not specifically identified with a national or state political party. Thus restriction is eliminated as to elections relating to constitutional amendments, referendums, approval of municipal ordinances and others of a similar character.

An amendment to the Act, which has application to certain state employees where the funds supporting the activity or institution with which they are connected are supplied in whole or in part by the Federal Government, exempts

> "any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the

United States; or by any recognized religious, philanthropic, or cultural organization."

It is clear that this exemption deals primarily with teachers, though no doubt other types of work come within such exempting provisions. To deny to Congress the power to make this classification is to say that the Congress may not rationally conclude that, while it should lay restrictions upon the political activity of Government employees generally, it should not do so where the duties of their work are such as to require acts which come within the general interdiction. Certainly the classification is not unreasonable viewed in the light of the objective of the legislation.

A further exemption by amendment relates to the participation of Federal employees residing in municipalities or other political subdivisions adjacent to the District of Columbia insofar as local campaigns and elections are concerned. The reasonableness of these classifications seem too obvious to require discussion to show that there is no arbitrary discrimination such as would invalidate the legislation.

All in all, we can see no sound reason for a conclusion that the second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution.

The motion of the defendants for summary judgment should be sustained and the complaint dismissed.

D. Lawrence Groner,
Jennings Bailey,
Jas. W. Morris,
U. S. Judges.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. ~~911~~ [redacted] 20

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL.,
Appellants,

vs.

HARRY B. MITCHELL, ET AL

On Appeal From the District Court of the United States for the District of Columbia

ANSWER TO APPELLEES' MEMORANDUM

LEE PRESSMAN,
FRANK DONNER,
Counsel for Appellants.

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IN THE

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No. 911

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL.,
Appellants,

vs.

HARRY B. MITCHELL, ET AL

On Appeal From the District Court of the United States for the District of Columbia

ANSWER TO APPELLEES' MEMORANDUM[1]

The Solicitor General has filed a memorandum suggesting that the Court may be without jurisdiction to entertain this appeal or that dismissal of the appeal may be appropriate because of delay in docketing. In our opinion, the suggestion is completely without merit and the Court should refuse the suggestion and note jurisdiction.

[1] In view of the unusual nature of the appellees' memorandum we are not certain of the procedure which is applicable. We have, however, proceeded as though the memorandum were a motion to dismiss, and the provisions of Rule 7, paragraph 3, giving 20 days to answer, were assumed to apply.

STATEMENT

This action challenges the constitutionality of that sentence of Section 9(a) of the Hatch Act which forbids employees in the executive branch of the federal government to take any active part in political management of political campaigns. Appellants, individual federal employees and their Union, charge that the challenged provision violates the rights of freedom of speech, of the press and of assembly guaranteed under the First Amendment to the Constitution and also contravenes the Fifth, the Ninth and the Tenth Amendments. The case was heard by a three-judge court, convened pursuant to Section 3 of the Act of August 24, 1937, 28 U.S.C. § 380(a), and on September 26, 1944, that court refused the plaintiff's motion for an injunction, dismissed the complaint and granted summary judgment to the appellees. Section 3 of the Act of 1937 provides that "an appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree or judgment."

Application for appeal was made on October 25, 1944, and the appeal was allowed on October 26, both within the time prescribed. However, the docketing of the record took place on February 2, 1945, a date more than 60 days from the allowance of the appeal and also after January 15, 1945, the expiration date of an extension of time for docketing the record granted by Chief Justice Groner, a member of the three-judge court.* The memorandum of the government in this case was not filed until after the record had been filed and docketed in this Court.

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* There was some ambiguity in Justice Groner's orders. On December 16, 1944, he signed a citation returnable 40 days from its date, or on January 25. If this date rather than the January 15 date of his order of December 21 is applicable, the record was filed in time (January 25), but it was not docketed at that time because the clerk raised a question as to the timeliness of the filing and docketing was delayed until we assured ourselves that under the law as we understand it docketing the appeal would correct any deficiencies which existed.

STATUTE AND RULES INVOLVED

Section 3 of the Act of August 24, 1937, 28 U.S.C., § 380a, provides in part that:

> ". . . In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. . . ."

Rule 47 of this Court, governing appeals to this Court under the Act of August 24, 1937, provides that such appeals "shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States . . . The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."* Rule 11 of this Court governing the docketing of cases in appeals provides in part as follows:

> "1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no

* Rule 72 of the Federal Rules of Civil Procedure provides that in such an appeal the record shall be "made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal."

case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court."

ARGUMENT

1. The suggestion of the government is so completely without merit that we believe it may be completely disposed of merely by reference to the old and well established rule of this Court that late filing and docketing of the record is not a ground for dismissal where the record was filed and docketed by the appellant before the motion to dismiss. *Bingham* v. *Morris*, 7 Cranch. 99; *Sparrow* v. *Strong*, 3 Wall. 97; *cf. Southern Pine Lumber Co.* v. *Ward*, 208 U. S. 126, 136, 137; See also *Vogel* v. *Saunders*, 92 F. (2d) 984, 985 (App. D. C. 1937), where the court overruled previous decisions to adopt the rule of the *Bingham* and *Sparrow* cases, stating:

> "The federal rule is that a motion to dismiss on the ground that the transcript has not been filed within the prescribed time comes too late when the transcript has actually been filed. . . . [citing cases]
>
> "After due consideration, we conclude that the federal rule operates more effectively to accomplish the desired result. Under that rule, in order for an appellee to avail himself of the fact that appellant has not filed his transcript within the time prescribed, he must file a motion to docket and dismiss before such transcript is actually filed; if appellee waits until the transcript is filed, even though it be filed after the time prescribed, a motion to dismiss on this ground comes too late. This tends to insure diligence on the part of an appellee and to expedite the determination of appeals."

However, the instant action is one of vital importance to millions of government employees and involves basic constitutional rights. We therefore believe it appropriate

to enter into a full discussion of the matter to point out not only the erroneous nature of the government's suggestion but the serious practical consequences which would follow from that suggestion.

2. As we understand it, the government apparently suggests, that the provision in Section 3 of the Act of August 24, 1937, providing for docketing in this Court within 60 days of the allowance of an appeal might be considered jurisdictional. It is apparently implicit in this suggestion that the 60 day period may not be enlarged by the District Court, by this Court or by any justices thereof, that failure to docket in time may not be excused by the Court and may be availed of after actual docketing. The basis for the suggestion briefly stated is that since the 30 day provision for petitioning for allowance of appeal is undoubtedly jurisdictional, the 60 day period for docketing the appeal is also jurisdictional. The conclusion is stated by the government to be "not . . . unreasonable". It is submitted that such a position can be made to appear other than unreasonable only by ignoring both the practicalities of litigation and the history of docketing provisions. From the earliest days periods of time for filing notice of appeal or for application to appeal or for petitioning for permission to appeal have been regarded as jurisdictional and failure to comply requires dismissal.* It is equally clear from the history of such provisions that the subsequent period provided by court rule for filing and docketing the record in the appellate court is not jurisdictional. See e.g., 10 Cyclopedia of Federal Procedure (2d ed. 1943) 684.†

*There may be exceptional circumstances even in such cases. See opinion of Justices Reed and Roberts in *R. F. C.* v. *Prudence*, 311 U. S. 579, 583.

†Such a rule is not only clearly set forth in the cases but is codified insofar as appeals to a Circuit Court of Appeals are concerned by Rule 73(a) of the Rules of Civil Procedure. That rule provides that when a notice of appeal has been filed within the time prescribed "Failure of the appellant to take any of the further steps to secure the review of the judgment ap-

The reason for the distinction is obvious. The notice of appeal, the petition for allowance of appeal, or the filing of a similar document is a simple action which may be taken on his own motion by any party desiring to appeal. There is thus no burden in requiring that notice of intention to carry a case to an appellate court shall be made within a specified time. On the other hand, the filing and docketing of a record is no such simple matter. It requires not merely preparation of a paper in the office of appellant's counsel, rather it is a process which may be long and drawn-out for reasons not within the control of appellant's counsel. It requires the cooperation of the clerks of the courts involved and, in many cases, of opposing counsel (See, e.g., Rule 75(a) of the Federal Rules of Civil Procedure). A rigid period for filing and docketing might well result in meritorious appeals failing for reasons of slight consequence and in cases where no fault existed on the part of appellant. Thus, as stated in 10 Cyclopedia of Federal Procedure (2d ed. 1943) 682: "The return day being by the rules not to exceed 40 days from the signing of the citation leaves time which may prove insufficient for the clerk to make up the transcript which must also include the bill of exceptions." This Court in *R. F. C.* v. *Prudence*, 311 U. S. 579, has held that a provision for appeal requires only that an application must be filed in time but has denied that it also must be allowed in time. Mr. Justice Douglas stated (at p. 582):

> "If that were true, the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted."

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pealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or when no remedy is specified for such action as the appellate court deems appropriate which may include dismissal of the appeal."

In the light of this well established distinction between periods for taking appeals and periods for docketing and filing of records, it would seem that only the clearest statement by the Congress could be regarded as intended to set up a different rule. However, the Act of August 24, 1937, contains no such statement. On the face of the statute the 30 day period for petitioning for appeal is absolute. On the other hand, the 60 day period for docketing is not absolute but is to be regulated "under such rules as may be prescribed by the proper courts." The rules prescribed by the proper courts in such cases have been set forth above.[6] They are Rules 47 and 11 of this Court.[7] Rule 11, by its terms, clearly indicates that the period for docketing the record is not jurisdictional for it contains specific provision for enlargement of time and paragraph 2 of the rule[7] clearly provides for waiver by the appellee of any deficiency in filing.[8]

The major difficulty with the government's suggestion in this respect lies in its assumption that Rule 11 may not be applicable. Rule 47 which the government states to be the applicable rule (see Memorandum, p. 6) is not the only rule involved. It is not self-sufficient and does not purport to be self-sufficient. It contains no provisions for procedure on docketing and no methods for challenging failure to comply with docketing procedures. Rather, by its terms it incorporates by reference "the rules of this Court regulating the procedure on appeal in other cases . . ." from federal courts. Since the rule applicable on appeals in

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[6] And also Rule 72 of the Federal Rules of Civil Procedure.

[7] Paragraph 2 of Rule 11 reads as follows:

> "2. But the appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed by the appellant within the period of time prescribed by this rule, or by the appellee within forty days thereafter, the case shall stand for argument."

[8] As we shall show later (p. 10, *infra*), the rule also clearly implies that a motion to dismiss comes too late after the record has in fact been docketed.

other cases with respect to docketing is Rule 11, Rule 47 can mean only that the procedure with respect to docketing set forth in Rule 11 shall be applicable to appeals such as the present one.

The government refers to the legislative history of the Act of August 24, 1937. Examination of that history shows that the docketing provision was not the subject of any discussion in the course of the legislative consideration of the Act. From this fact the government is unwilling to draw the obvious conclusion. Rather, it states: "There is no evidence in the legislative history of the Act of 1937 here involved as to whether or not the past appellate practice was in the minds of the framers of the Act." (Memorandum, p. 5) It seems to us clear, however, that the absence of special mention of the docketing provision in the Act compels the conclusion that Congress did not intend to disturb the well established "past appellate practice" uniformly applied in this Court and in the Circuit Courts of Appeals. Any other assumption is untenable. As this Court said in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329: "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

The technical construction of the statute which the government suggests would, moreover, defeat the broad objectives of the Act of August 24, 1937. That statute is an expediting statute and provides for speedy determination of appeals by this Court. It directs an immediate convocation of a three-judge district court; it provides a direct appeal to this Court, and it states that this Court shall hear the appeal "at the earliest possible time" and give such an appeal "precedence over all other matters not of a like character." The ultra-technical and rigid approach of the government to docketing and other pro-

cedural requirements under such a statute would result in postponement or avoidance of final decision of important questions of constitutional law in direct contravention of the purpose of the statute. The instant case is an example of the unsatisfactory results of such application of the statute. Dismissal of the instant petition would leave the rights of federal employees generally and of the government in doubt. The provision of the Hatch Act in dispute would not be finally ruled either valid or invalid. The decision of the District Court would not be accepted by federal employees or by the government as final. One of the appellants would be dismissed from his job and the present appellants or most of them would be debarred from litigating their constitutional rights. Other federal employees, dissatisfied with the restrictions upon them, would be compelled to bring another suit and to go through the many useless motions necessary to bring the case here again and to make it ready for argument. Further, the rules so applied could not be applied solely in cases where the delay is by a private party who has failed in the lower court in his attack on the statute. It would have to be applied equally to cases where the government has lost below and in such cases would leave outstanding an unfavorable decision jeopardizing the enforcement of the statute for a long period of time. The rule would also have to be applied in private suits in which the government has intervened pursuant to Section 1 of the Act of August 24, 1937. In such cases under this section of the Act, which is identical with the provision now under discussion, the government's rights would be prejudiced by delay of the private parties in docketing the record. Such a construction should not be given to a statute which has for its purposes expedition; rather the more flexible rules generally applicable in the federal courts should be applied, for the purpose of those rules, like that of the Act of August 24, 1937, is "to expedite the determination of ap-

peals." *Vogel* v. *Saunders*, 92 F. (2d) 984, 985 (App. D. C. 1937).

In the light of all of these considerations it is submitted that the 60 day period for docketing the record under the Act of August 24, 1937, is not jurisdictional, that such period may be extended by the appropriate courts or judges thereof, that it may be waived, and that failure to comply may be excused by the court.

3. Since, as we have established above, the 60 day period is not jurisdictional, we may assume, contrary to the government's suggestion, that Judge Groner under Rule 11 had the power to extend the time for filing the record to January 15, 1945. We concede* that delay beyond that date in filing and docketing the record was a failure to comply with the rules of this Court and might have been the ground for a motion to dismiss made prior to the actual filing and docketing of the record.** However, the government did not follow the remedy provided in Rule 11 of itself docketing the record and moving to dismiss. Instead, it waited until appellants filed and docketed the record. Under the circumstances, decisions of this Court make it clear that the present motion or "suggestion" comes too late because it was made after the record had been filed and docketed. *Bingham* v. *Morris*, 7 Cranch. 99; *Sparrow* v. *Strong*, 3 Wall. 97.** See *Southern Pine Lumber Co.* v. *Ward* and *Vogel* v. *Saunders*, *supra*, p. 4.

The rule of those cases is clearly incorporated by implication in Rule 11 itself. That rule provides that fail-

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* Subject to the comment made in n. 1 above.

** In that event we should, of course, have opposed the motion, urging excuses for our default and pointing out that the delay occasioned no injustice or prejudice to the government. Such arguments may be successful even in reinstating appeals already dismissed. *Bank of the U. S.* v. *Swan*, 3 Pet. 68; *Gwin* v. *Breedlove*, 13 Pet. 284; see the last sentence of Rule 11(1), providing for reinstatement of an appeal already dismissed "by special leave of court."

** There was at one time an exception to this rule in the case of long delays extending beyond the expiration of the next term after the writ of

ure to docket in time may be the occasion for the appellee having the cause docketed and the appeal dismissed. It makes no provision for such a motion except in conjunction with docketing the case by the appellee. The implication is clear that once the appeal has been docketed by the appellant it is too late to move to dismiss the appeal for delay in docketing.

The rule of the *Bingham* and the *Sparrow* cases is a rule which is especially applicable to cases under the Act of 1937, for it will carry out the purposes of that Act to expedite the determination of important constitutional questions. As the Court of Appeals of the District of Columbia said in rejecting its earlier rule and following the *Bingham* and *Sparrow cases*, the rule of those cases "tends to insure diligence on the part of an appellee and to expedite the determination of appeals." *Vogel* v. *Saunders*, 92 F. (2d) 984, at 985.

The government does not contest the principle of these cases. Indeed, it does not mention them. It merely states that it is "not advised that any mitigating circumstance excused the failure of compliance with the statutory requirement." (Memorandum, p. 6.)

Under the rule of the *Bingham* and *Sparrow* cases, as we understand it, the reasons for an appellant's original default are immaterial after he has filed and docketed the record. The appellee has the right to an explanation only

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error was issue. *Evans* v. *The State National Bank of New Orleans*, 134 U. S. 330; *Credit Company, Ltd.* v. *Arkansas Central Railway Co.*, 128 U. S. 258, 259; *Villaboles* v. *U. S.*, 6 How. 81, although even in such a case the appeal might be allowed to stand if a "satisfactory excuse for the laches is made." *Richardson* v. *Green*, 130 U. S. 104, 111. That limitation on the rule, however, has been abolished, 10 Cyclopedia of Federal Procedure (2d ed., 1943) 684; *cf. id.* n. 91.

The Supreme Court rule considered in the *Bingham* case is set forth in 3 Cranch. 239 and requires the filing of the record "within the first six days of the term" where the judgment appealed from was rendered "at least thirty days previous to the commencement" of the term. The rule referred to in the *Sparrow* case is similar in terms and is set forth in 21 How. VII.

if he is diligent in docketing the record himself and moving to dismiss before the appellant dockets the record. We believe that if our reasons for delay were relevant, they would be found adequate. In any event, we would have been glad to advise the government of the details had it earlier expressed an interest in the matter.

CONCLUSION

The Court should reject the government's suggestion and note jurisdiction of the appeal.

Respectfully submitted,

LEE PRESSMAN,
FRANK DONNER,
Counsel for Appellants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 20

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.) et al., *Appellants*

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMMING, *Appellees*

On Appeal From the District Court of the United States for the District of Columbia

---

BRIEF FOR APPELLANTS

LEE PRESSMAN,
FRANK DONNER,
Attorneys for Appellants

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No. 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.) et al., *Appellants*

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMMING, *Appellees*

On Appeal From the District Court of the United States for the District of Columbia

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the court below (R. 116-126) is reported in 56 F. Supp. 651.

JURISDICTION

The judgment of the court below was entered on September 26, 1944 (R. 126-127). A petition for appeal was filed on October 26, 1944, and was allowed on that day (R. 127-128, 130). Successive orders of the court below extended the time for filing of the record in this Court (R. 130, 131, 133). The record was docketed in this Court on February 2, 1945 (R. 136). Thereafter, the Government filed a suggestion that the appeal be dismissed for want of jurisdiction or lateness in the filing of the record, and appellee filed a reply.* On March

* The Court is respectfully referred to the brief filed by the appellant in reply to the Government's suggestion.

12, 1945, this Court issued an order postponing further consideration of its jurisdiction to the hearing on the merits (R. 135). The jurisdiction of this Court on the appeal rests on the provisions of the Act of August 24, 1937, 28 U.S.C. Sec. 380 (a), 50 Stat. 751.

QUESTION PRESENTED

Whether rights of free expression protected by the First Amendment to the Constitution and other provisions of the Bill of Rights are unconstitutionally abridged by Section 9 (a) of the Hatch Act which forbids persons employed in the Executive Branch of the Federal Government, upon penalty of immediate dismissal, to "take any active part in political management or in political campaigns," when activities so forbidden include acts, performed by the employees in their capacity as private citizens on their own time and without coercion or abuse of official authority, such as publishing a newspaper, publishing a letter or article, making speeches, initiating or circulating petitions, marching in a parade, where these acts constitute expression of support for a political candidate, party, or measure as part of a political campaign.

STATUTES INVOLVED

The Constitution of the United States

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Hatch Act

The statute here challenged is the second sentence of section 9(a) of the Hatch Act as amended, Act of August 2, 1939, C. 410, section 9(a), 53 Stat. 1147, 1148; Act of July 19, 1940, C. 640, section 2, 54 Stat. 767; Act of March 27, 1943, C. 199, section 701, 56 Stat. 181, 18 U.S.C. section 61 h(a). Section 9 in its entirety provides as follows:

> (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any

agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purpose of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

Section 15, Act of July 19, 1940, C. 640, section 4, 54 Stat. 767, 18 U.S.C. sec. 61(o), provides:

"The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns."

Civil Service Rules and Regulations

Civil Service Rule I, Section 1, 5 C.F.R. Sec. 1.1 (Supp., 1941), provides:

> No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinions on all political subjects, shall take no active part in political management or in political campaigns.

Civil Service Rule XV, 5 C.F.R. Sec. 15.1 (Supp., 1941), provides:

> Legal appointment necessary to compensation. Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or rules, or of any Executive Order or any regulation of the Commission, or that any employee subject thereto has violated such act, rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instruction of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing.

STATEMENT

This is an action instituted by twelve individuals employed by the Federal Government in positions which are under the classified civil service and by the United Federal Workers of America (C.I.O.) an unincorporated labor union composed of employees of the Federal Government on behalf of those of its members who are in the classified civil service. The action was brought to secure a declaration of the invalidity of, and an injunction against the enforcement of the provision of the second sentence of section 9(a) of the Hatch Act, 18 U.S.C. Sec. 61 h(a) forbidding Federal employees "to take any active

part in political management or in political campaigns" on the grounds that the prohibitions imposed by this section deprive plaintiffs of the basic civil rights of freedom of speech, of assembly, and of the press, the right to be free from arbitrary discrimination with respect to their Federal employment, and the right to engage in political activity guaranteed to them by the First, Fifth, Ninth, and Tenth Amendments to the Constitution of the United States.

The individual appellants are employed by the Federal Government in a variety of capacities of widely different character, so far as concerns the nature of the duties performed, the extent of their official authority, their contact with the public and their participation in formulating policy. Four of the appellants are employed in professional capacities. These are: Jack M. Elkin, who is employed by the Railroad Retirement Board as a Senior Economic Statistician (R. 2); Olivia Israeli Abelson, who is employed by the Social Security Board of the Federal Security Agency as an Associate Financial Analyst (R. 2-3); Joseph D. Phillips, who is employed by the War Shipping Administration as a Labor Economist (R. 3); and Margery Mitchell, who is employed by the National War Labor Board as a Wage Analyst (R. 3). Four of the appellants are employed in administrative positions of varying degrees of responsibility. Thus, Patrick T. Fagan is employed by the War Manpower Commission as an Area Director (R. 2); Harry T. Winegar is employed by the Bureau of Prisons of the Department of Justice as a Senior Officer (R. 2); Rudolph Hinden is employed by the Federal Security Agency as a Procedural Assistant (R. 2); and Albert J. Rieck is employed by the Veterans Administration as a Stock Clerk (R. 3). The last four appellants are employed in such establishments as navy yards, arsenals, and the Mint, as industrial workers. George P. Poole is a Roller in the United States Mint (R. 2); Charles G. Shane works in the Frankford Arsenal of the War Department as a Lens Grinder (R. 3); Richard Weber works at the same place as a Machinist Specialist (R. 3); and Lester E. Tempest works at the Philadelphia Navy Yard as an Electric Welder (R. 3).

These appellants instituted suit in April 1944, when the nation was yet engaged in the conduct of the war. The political campaigns in connection with the 1944 elections which were then getting under way centered around vital issues relating to the conduct of the war, the cost of living, and the rights of organized and unorganized workers (R. 9). Appellants, other than Poole, in their affidavits accompanying their prayer for declaratory and injunctive relief, expressed their desire to participate in the political processes by which decisions on these issues of grave importance were being made (R. 11-29). They desired to do so by engaging in the following acts on their own time, as private citizens, without recourse to any official authority; write for publication letters and articles in support of candidates for office; be connected editorially with publications which are identified with the legislative program of U.F.W.A. and candidates who support it; make speeches to rallies, conventions, and other assemblages; solicit votes, aid in getting out voters; act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; post banners and posters in public places; participate in and help in organizing political parades; distribute leaflets; "ring doorbells" and engage in discussion; initiate petitions, and canvass for the signatures of others on such petitions; serve as party ward committeeman or other party official; and perform any and all acts not prohibited by any provision of law other than the second sentence of section 9(a) and section 15 of the Hatch Act, which constitute taking an active part in political management and political campaigns (R. 4, 10-12, 14-27).

The appellants were, however, deterred from engaging in these activities by the second sentence of section 9(a) of the Hatch Act, which forbids these activities and requires the dismissal of appellants from their Federal employment if they engage in any of these activities. And they are unwilling to suffer the deprivation of their jobs, which would result in immediate and serious financial loss and other injury to them. They therefore seek relief by way of declaratory judgment of the invalidity of these prohibitions of the Hatch Act, and injunctive relief against their threatened enforcement by the Civil Service Commission (R. 9, 10-12, 14-27).

The Civil Service Commission in its Form 1236, *Political Activity and Political Assessment of Federal Officeholders and Employees* (R. 36-70) has stated that it possesses jurisdiction to inflict the penalty of dismissal prescribed by section 9(b) of the Hatch Act for performance of any of the acts prohibited under section 9(a), and that it may, by application of its Rule XV, cause such dismissal independently of action by the appointing officer (R. 41). In addition, an opinion of the Attorney General, given on January 8, 1941, recognizes the authority of the Civil Service Commission to cause such dismissal of employees in the classified civil service. And in a warning poster, conspicuously posted in places where employees in the classified civil service perform their duties, it has widely publicized to appellants and other Federal employees its intention to cause the dismissal of any employee in the classified civil service who performs any of the forbidden acts (R. 114A, 115).

In the case of appellant Poole, the Civil Service Commission had in fact instituted proceedings on January 12, 1944, to cause his dismissal on the ground that he committed acts which constitute taking an active part in political management and political campaigns, by holding the political party office of Democratic ward executive committeeman in the city of Philadelphia, Pennsylvania, by aiding and assisting the Democratic party in the capacity of worker at the polls on general election day, November 5, 1940, and by assisting in the distribution of funds in paying party workers for their services on that general election day (R. 7, 33). It was not alleged that these acts were accompanied by coercion or other impropriety or violated any other statute or rule (R. 33-35). Appellant Poole in his affidavit admits that he has performed these acts, on his own time as a private citizen, as well as others which constitute taking an active part in political management and political campaigns, among them: visiting residents of his ward and soliciting them to support his party and its candidates; circulating campaign literature; placing banners and posters in public places; distributing leaflets, and assisting in organizing political rallies and assembles (R. 13). He further states that he does not wish to, and will not deny his political

activity and proposes to engage in such activity since it is for him the most important activity in which any citizen can engage (R. 14).[1]

Appellants' motion for an interlocutory injunction and appellees' motions to dismiss and for summary judgment were argued together on June 29, 1944, before a statutory District Court composed of three judges. On August 4, 1944, the court below filed an opinion holding that a timely controversy was presented by the actions of the individual appellants, and that, on the merits, the statute was valid. And on September 26, 1944, it entered an order granting appellee's motion to dismiss the complaint and for summary judgment.

SUMMARY OF ARGUMENT

I

The general prohibition of the second sentence of Section 9(a) of the Hatch Act, as originally passed in 1939, could have been so construed as not to impair substantial rights of freedom of expression of Federal employees. But the enactment of Section 15 of the Hatch Act in August, 1940, made such a construction impossible. For it provided that interpretations which the Civil Service Commission had theretofore given under its Rule I, Section 1 were to define the acts forbidden by section 9(a). These interpretations expressly forbid Federal employees from doing specified acts, even on their own time, without coercion or other abuse, in their capacity as private citizens, so long as these acts amount to taking an active part in an organized political campaign. Among the acts so forbidden are: writing for publication a letter or article in favor of, or against any political party, candidate, faction, or measure; addressing a meeting; marching in a political parade. In prohibiting these acts and other like acts, section 9(a) clearly curtails rights of expression enjoying the protection of the First Amendment. The permission granted by

[1] On September 8, 1944, Justice Bailey, a member of the statutory three judge court in this case, entered an order pursuant to stipulation of the parties, providing that, pending disposition of the appeal to this Court, the appellees will not cause the removal of appellant Poole so long as, and upon condition that he does not engage in any of the activities proscribed in Section 9(a) of the Hatch Act.

section 9(a) to Federal employees "to express their opinions on all political subjects and candidates" has been limited to such expression as does not amount to taking an active part in an organized political campaign. It therefore does not serve to avoid conflict with the First Amendment, for the rights are limited under the very circumstances when their exercise would have significance.

Presented with a statute which plainly curtails rights of expression, the court below upheld it on the ground that the end sought is a permissible one, and the question of how it is to be achieved is for Congress, and not the courts, to decide. But this application of the usual presumption of validity to a statute which on its face limits rights of expression is plainly erroneous. For when it is sought to curtail basic rights of expression a substantial showing of the necessity for the limitation must be made. *Schneider* v. *New Jersey*, 308 U. S. 147, 161. This stringent test must be applied since rights of expression are the most vital to the existence of our democratic institutions. *Thornhill* v. *Alabama*, 310 U. S. 88, 101-102; *Bridges* v. *California*, 314 U. S. 252, 262-263. To deny rights of expression to any group is to cut it off from an opportunity to participate in the processes which have their outcome in legislative and other decisions affecting its interests. *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152-153. Congress, therefore cannot be its own judge of the propriety of curtailing rights of expression to achieve other ends. It must be therefore determined whether any substantial justification for the prohibition of section 9(a) exists.

II

Three grounds have been generally urged in support of a sweeping prohibition on political activity of government workers. The first is that participation in political affairs may invite reprisals from superior officers or a new administration of an opposite complexion. Curtailment of such activity is therefore necessary to preserve security of tenure and efficiency of service. The second is that the possibility that Federal employees may use their official power and position to coerce subordinates or members of the public in the exercise of their political rights, creates an evil which the gov-

ernment may suppress. The third is that barring Federal employees from political activities is necessary to preserve the purity and impartiality of the civil service, and to promote public confidence in the fairness of administration.

While these grounds may justify invasion and suppression of other interests, they do not succeed in justifying the sweeping prohibition of rights of expression imposed by section 9(a) and its comprehensive application to almost all Federal employees, whatever the nature of their duties. These prohibitions pass the bounds of necessity for dealing with the evils without needlessly suppressing the rights.

Preservation of security of tenure by eliminating occasions for reprisals cannot at all serve to justify the prohibition. A merit system of civil service promotes security of tenure by curtailing powers of dismissal, not basic rights of employees. This is reflected in the Civil Service Act itself, 5 U.S.C. sec. 633(a) (5) and (6), and the Lloyd-La Follette Act, 5 U.S.C. sec. 652. It cannot be argued that these statutes do not afford adequate protection to the employee, so that in any event his political activity will place his tenure in jeopardy. For if that is so, the solution lies in strengthening the guarantees against arbitrary dismissal, and not in curtailing basic rights of employees.

The aim of suppressing coercion and other abuse of authority also cannot justify the prohibition. Other provisions of the Hatch Act itself comprehensively deal with coercion and abuse of authority. In addition, a large body of other Federal statutes cover the subject of coercion and exploitation of office in a manner showing regard for preservation of Federal employees' rights of expression and rights to engage in political activity. Congress is free to attack evils of improper political activity, but cannot totally deprive Federal employees of the rights themselves. *Ex parte Curtis*, 106 U. S. 371; *U. S.* v. *Thayer*, 209 U. S. 39.

The theory which most clearly underlies the prohibition of section 9(a) is that it is necessary to create an impartial body of civil servants, which would serve to protect the merit system and promote public confidence in administration. Whatever else may be done to achieve this end, freedom of expres-

sion of all Federal employees may not be suppressed to attain it. There is little or no public interest in the impartiality and fairness of the largest part of the civil service which consists of minor clerical, service, and industrial employees with no contact with the public, authority over it, or participation in policy making. The foreign practice of Great Britain and Canada affords no precedent for a sweeping prohibition applicable to all government workers, industrial as well as administrative, the most subordinate clerks as well as high policy officers. Nor does the history of the Civil Service in this country provide any such precedent. And the legislative history of the Hatch Act reveals no factual basis for such a prohibition of political activity of all Federal employees. The harm likely to result from cutting off so large a body of citizens from their full rights of citizenship and participation in public affairs, clearly outweighs the theoretical benefits of "political neutrality." Even without such a requirement of neutrality, the merit system insures fairness and able administration by selection of personnel on the basis of merit, and promotion of efficiency and independence of judgment by providing security in freedom from arbitrary dismissals.

III

Congress in legislating on the subject of government employment is limited by the First Amendment and other Constitutional guarantees. It cannot be assumed that individual officers possess unlimited removal power, therefore Congress possesses such power, and short of exercising it, it may impose any condition to public employment. For no case holds that any officer deriving authority from an Act of Congress may use his authority to abridge freedom of expression or of religion.

The doctrine that there is no property right in a job does not establish an unlimited power over public employment. It deals with two entirely different matters, the forum in which a public officer may seek redress in connection with claimed improper exercise of discretion in appointment and dismissal, and the extent to which the authority of the several states to establish and change the incidents of a public office, or abolish

it are limited by the Federal Constitution. None of these cases hold that the states may by statute impose arbitrary conditions or discriminations without invalidly abridging constitutional guarantees. See *Snowden* v. *Hughes*, 321 U. S. 1, 7. The courts have taken the contrary view. See *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195.

No cases disclose a power in the government to condition the grant of privileges as it pleases, without regard for the Bill of Rights. The cases establish rather that the conditions must be within constitutional limits. Thus, for example, barring of conscientious objectors from public benefits has been upheld on the ground that the recognition of conscientious objection is itself a matter of legislative grace rather than a basic right historically within the content of the guarantee of freedom of religion. *Hamilton* v. *Board of Regents*, 293 U. S. 245; *In re Clyde Wilson Summers*, —— U. S.——, 89 L. Ed. 1304 (decided June 11, 1945). See also *West Virginia* v. *Barnette*, 319 U. S. 624, 632.

Since, therefore, Congress is limited by the Bill of Rights in its powers to legislate as to Federal employees, and since no substantial showing of justification can be made for the general prohibition of rights of expression exercised in political activity of Federal employees, imposed by the second sentence of section 9(a), that provision is repugnant to the First Amendment and invalid.

ARGUMENT

I. THE SECOND SENTENCE OF SECTION 9(A) OF THE HATCH ACT CLEARLY INVADES AND INFRINGES RIGHTS OF FREE EXPRESSION AND THEREFORE CANNOT ENJOY A PRESUMPTION OF VALIDITY.

At the outset it is well to mark out the precise limits of our position in this case. We concede that the government has adequate power to limit political activities of Federal employees where they involve coercion, abuse of official authority, venality or any other substantial evil. We agree that the government may impose limitations reasonably designed to cope with substantial evils which the government may sup-

press. We do contend, however, that where the subject of regulation is rights of free expression, the limitation imposed must be moulded to deal with the evils without needlessly and wastefully suppressing rights of expression. We claim that the prohibitions imposed by section 9(a) of the Hatch Act are unduly sweeping in their application to all employees of the Executive branch, with negligible exceptions, and are designed to suppress obvious exercises of rights of free expression without adequate justification. Such evils as exist may be properly met in a more carefully drafted enactment which does not unnecessarily deprive Federal employees of rights of free expression and participation in public affairs which they are entitled to exercise in common with all other persons.

Section 9(a) of the Hatch Act as originally passed on August 2, 1939, provided that "no officer or employee in the executive branch of the Federal Government or any agency or department thereof . . . shall take any active part in political management or in political campaigns." This extremely general language could readily have been so construed and applied as not to result in conflict with the First Amendment. Thus, it might be reasonably contended that no issue under the First Amendment is raised by a statute forbidding Federal officers to run for political office, or to act as campaign managers for others. It is clear from President Roosevelt's message issued when he signed the original Hatch Act on August 2, 1939, that he based his conclusion that the Act was valid on the view that it would be so interpreted as not to preclude government employees from effective exercise of their rights of free speech. 84 Cong. Rec. 10745-10746.

However, the passage of section 15 of the Hatch Act, 28 U.S.C. Sec. 61(o), a year later, on July 19, 1940, thereafter made it impossible to intepret the broad language of Sec. 9(a) as to avoid conflict with the First Amendment. For that section expressly provides that the then current interpretations of the Civil Service Commission of the language of its Rule 1, Section 1, which is substantially identical with the prohibition of section 9(a) of the Hatch Act, shall define the acts pro-

hibited by section 9(a). These interpretations which thus became incorporated into section 9(a) are contained in Civil Service Commission Form 1236, dated September 1939, *Political Activity and Political Assessments of Federal Officeholders and Employees* (R. 32, 71-111).

These interpretations specify the activities specifically prohibited to government employees. These activities are forbidden without regard to whether they are performed by government employees on their own time, without coercion or abuse of authority or any other context of impropriety. And they are forbidden to all Federal employees in the Executive branch of the government including minor administrative, service, and industrial, with negligible exceptions. Federal workers may not "publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure" (R. 84). They may not address a meeting, convention, or caucus, or make motions or assist in preparing resolutions (R. 81, 82). While federal employees may become a member of a political organization, they may not attempt to influence other members by actions or utterances (R. 81). And while they may sign petitions addressed to state, county, or municipal governments, they may not initiate them, circulate them, or canvass for the signatures of others (R. 85). Federal employees may not march in a political parade, organize, or be an officer or leader of such a parade (R. 84). Finally, "a government employee may not take part in the activities of a musical organization in any parade or other activities of a political party" (R. 85).

Section 9(a) of the Hatch Act and Rule 1, Section 1 of the Civil Service Commission do indeed contain the language:

> "All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates."

The right to express opinions on all political subjects, apparently reserved by Section 9(a), has however been held by the Civil Service Commission to be qualified by the prohibition on taking an active part in political management and political

campaigns (R. 83, 44-45). See also *Op. Atty. Gen.* (Jan. 8, 1941), pp. 8, 13-14. Thus, any expression of opinion which constitutes active participation in a political campaign, such as addressing a caucus, a convention, a rally, or other meeting, or writing a letter or article in the newspapers advocating the program of a particular political party or the election of a candidate, is forbidden. This language therefore does not serve to avert constitutional difficulties under the First Amendment. While Congress may require that speech be removed from a context of coercion (*Virginia Electric Co.* v. *N.L.R.B.*, 318 U. S. 752), it may not require that it be removed from a context of significance and effectiveness (*Bridges* v. *California*, 314 U. S. 252, 269). For the same reason these difficulties are not avoided by the dispensation granted by section 16 of the Hatch Act, 18 U.S.C. sec. 61 p, which enables the Civil Service Commission to authorize such activities in the local affairs of a municipality composed of a majority of Federal employees, or by Section 18 of the Hatch Act, 18 U.S.C. sec. 61 r, which permits participation in purely local campaigns in which the national political parties are not involved.

Activities other than those singled out above are prohibited in Civil Service Commission Form 1236. Appellant agrees that some of them, were they separately imposed, and not commingled with the restrictions here challenged, and sweepingly applied, would raise no constitutional issues. But the question is unavoidably presented how the express curtailments of obvious instances of the exercise of the rights of freedom of speech, of the press, and of assembly, set out above, and the broad provision which imposes them, can stand in the face of the First Amendment.

The court below resolved this question simply by finding that the removal of government employment from politics is a permissible legislative end, and that the question of how this end is to be pursued is one for the Congress, and not the Courts to decide (R. 124-125). In so deciding, the court below is applying the usual test for the validity of regulatory legislation, without regard to the fact that the rights substantially invaded and suppressed by the legislation here challenged are ones within the ambit of the First Amendment. But this view of

the court below is improper and erroneous. For this Court has consistently held that where interests protected by the First Amendment are obviously invaded, the usual test for the validity of regulatory legislation is inapplicable and a far more rigorous test must be applied. Thus, in *Schneider* v. *New Jersey*, 308 U. S. 147, 161, this Court stated:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government of free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.
>
> "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

Every consideration underlying this test is particularly applicable in this case. Since this Court is being asked to declare an Act of Congress unconstitutional, it is appropriate to analyze and lay bare the basic elements of this test, and to show that this Court would not be exceeding its competence in embarking upon a stringent examination of the sufficiency of the grounds offered in justification of the curbs on expression imposed by the Hatch Act.

Ordinarily, when regulatory legislation is challenged on the ground that it conflicts with the individual's interest (pecuniary or otherwise) in being free from regulation, its validity can be established by a showing that a permissible legislative power is being reasonably exercised. Regulatory legislation must inevitably impinge on, and limit some individual's private interest in being free from regulation. But under our form of government the authority to make the judgment as to whose interest must yield is vested in the legislature. *Miller* v. *Schoene*, 276 U. S. 272. Indeed a premise of our democratic

system is that the individual is able to participate in the legislative decisions affecting his private interest through the ordinary political processes, and the exercise of his right to be heard. *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 152-153. When freedom of expression and the right to engage in political activity exist, there is an opportunity to influence and receive redress from adverse official action. When these rights are curtailed, however, that opportunity is cut off. It is therefore not the case that the right of free expression is simply one of a multitude of private interests which the legislature may treat with as it sees fit. It is, as this Court has so often recognized, the core of our democratic system of government.[1] *Schneider* v. *New Jersey*, 308 U. S. 147, 161; *Thornhill* v. *Alabama*, 310 U. S. 88, 101, 102; *Bridges* v. *U. S.*, 314 U. S. 252, 262, 263. See *Palko* v. *Connecticut*, 302 U. S. 319. And the purpose of the First Amendment is not simply to protect all sorts of expressions of trivial or esoteric views, but is rather primarily designed to enable all persons to be heard on the immediate, pressing, and controversial issues of public importance vital to all. "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." *Bridges* v. *California*, 314 U. S. 252, 269. See also *DeJonge* v. *Oregon*, 299 U. S. 353, 364-365.

The statute here challenged commands particular scrutiny for two important reasons. In the first place it suppresses the exercise of a right upon which the very existence of a democratic government depends. This is so not only in the positive

[1] And it was viewed in that very light from the beginnings of our form of government. Madison in his report on the Virginia Resolutions directed against the Alien and Sedition laws of 1798 stated:

> "Of this act it is affirmed—1. That it exercises, in like manner, a power not delegated by the Constitution; 2. That the power, on the contrary, is expressly and positively forbidden by one of the amendments to the Constitution; 3. That this is a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public character and measures, and of freely communicating thereon, which has ever been justly deemed the only effectual guardian of every other right." IV Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836), 561.

sense already indicated, by cutting off from nearly three millions of citizens the means of giving effective voice to their political preference but also in the negative sense that it correspondingly weakens the disposition to accept majority decisions which is a concomitant of the right to influence or reverse legislative decisions. In the second place, this statute is operative at precisely that point in this extremely vital area of political expression at which civil rights have their deepest meaning—where others are sought to be persuaded; and their greatest value—where the issues are most controversial.

When, therefore, a statute has the ascertainable effect of circumscribing or suppressing freedom of expression, particularly involving political rights, conflict with the First Amendment can be avoided only by a substantial showing that the purpose of the statute is not the curtailment of free expression but rather the achievement of some other legislative purpose which is a permissible one; that the means utilized are reasonably necessary to achieve that purpose, or in other words, that the incidental infringement is unavoidable if the purpose is to be achieved; and that the legislative interest in achieving that purpose is so vital and substantial as to justify the incidental curtailment of expression which results. Thus the interest in preventing the obstruction of recruiting an army justifies suppression of speech which creates a "clear and present danger" of that eventuality. *Schenck* v. *U. S.*, 249 U. S. 47. However, the interest in keeping the streets clean does not justify licensing of distributors of leaflets. *Schneider* v. *New Jersey*, 308 U. S. 141, 162. Inevitably this Court must weigh the substantiality of the evil dealt with by the legislature against the extent of curtailment of free expression which would result, and determine whether or not the curtailment is justified by any substantial and pressing necessity for dealing with the evil.

It was never intended that the legislature should be its own judge of the propriety of legislation which invades interests expressly protected by the Bill of Rights.[1] For it is in terms

[1] See the statement of James Madison on the introduction of the Bill of Rights in Congress. I *Annals of Congress*, 1st Cong., 1 Sess. (1789), 453-458.

a ban on Congressional action. And if Congress is free to make its own judgment as to when to observe the ban and when to disregard it, it would be rendered nugatory. The court below was therefore in error in refusing to inquire into the sufficiency of the grounds urged in justification of the substantial curtailment of free expression worked by section 9(a) of the Hatch Act. That inquiry, when made, reveals that no sufficient justification exists for the sweeping deprivation of Federal employees' rights of free expression on political issues.

The legislative history of the Hatch Act, the argument of the Government in the court below, and the opinion of that court set out three theories as grounds of justification for the curtailment of government workers' rights of expression worked by the Hatch Act. The first is that the possibility that superior employees may use their position and power to coerce inferiors, and Federal officials to coerce private citizens in the exercise of their political rights, creates a substantial evil which the government may correct. The second is that participation in political affairs by Federal employees may invite reprisals from superior officers or a new administration of an opposite political complexion, and that the government may therefore limit such participation in order to protect the security of tenure and promote the efficiency of service of Federal employees. And the third is that barring Federal employees from any political activities tends to diminish their incentive to do favors for, and seek the support of, successful political candidates or others, and thus serves to promote the purity of the civil service by securing the impartiality of civil servants in their dealings with the public. Analysis of these three theories reveals that they achieve plausibility in apologizing for sweeping prohibition of rights of free expression only by commingling improper and proper activities and by assuming that these cannot be separated so that the evils themselves can be met without suppressing the proper activities; by supposing that less sweeping remedies accommodated to deal only with the evil cannot be devised; and that in any event the government is free to impose any limitation whatsoever on government employment and is itself the sole judge

of the propriety of the limitations imposed. All of these assumptions are unwarranted and utterly fail to supply the substantial justification necessary for the validity of the challenged statute.

II. NO SUBSTANTIAL JUSTIFICATION EXISTS FOR SO BROAD A PROHIBITION AS EXTENSIVELY APPLIED AS SECTION 9(a).

A. Permissibility of the object is not sufficient to satisfy the Required Showing. Necessity for the Limitation and the Appropriateness of the Means Must Be Shown.

The three grounds of justification urged do indeed concern objectives which may properly be the subject of legislative action. The government may endeavor to protect the security of tenure of Federal employees and promote the efficiency of service. It may also prevent coercion and other abuse of official power. And it may seek to secure the impartiality of government officers and promote public confidence in the fairness of administration. But it may not seek these objectives at any cost and by any means whatsoever. For the First Amendment makes it clear that the interests of freedom of expression and freedom of religion cannot be curtailed merely because, by the curtailment, the legislature may reasonably achieve some other objective which appears to it desirable. Any other interest not enjoying express constitutional protection must yield to such a legislative judgment. Thus the authority to dismiss of superior officers must undoubtedly give way to a legislative purpose of promoting security of tenure. Solicitation of funds by government employees may be wholly forbidden to prevent coercion. And public officers may be required to give up all connections and financial interests in private enterprises in order to promote impartiality of administration. These may be done even if the evils apprehended are only possible ones and not present or imminent, so long as the means is rationally related to the end sought. For these are not interests enjoying the express protection of the First Amendment, which unequivocally states "Congress shall make no law abridging the freedom of speech. . . ." And, "The

command 'Thou shalt not . . .' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense." *Conn. Power & Electric Co.* v. *Federal Power Commission*, 324 U. S. 515, 532. Just as the agencies must accord respect to the will of Congress expressed in the language of prohibition, so must Congress accord respect to the express prohibitions of the Constitution.

Study of the three asserted grounds of justification leads to the conclusions that Congress has in the past pursued these objectives without encroaching on interests enjoying constitutional protection, indeed, with a scrupulous regard for the preservation of these constitutional rights; that in any event, substantial achievement of the objectives sought does not at all require sweeping suppression of freedom of speech; and that, to the extent that their accomplishment may be thought to do so, their achievement does not justify extinguishment of basic rights. In sum, while pursuit of these objectives may permit many kinds of enactment curtailing a wide variety of interests, it does not permit so cavalier a suppression of rights of free expression as is effected by section 9(a) of the Hatch Act. To establish that this section passes the bounds of necessity and substantial regard for the prohibitions of the bill of rights, we shall take up each ground of justification and consider the character of the end sought, the aptness of the means utilized to achieve it, other means Congress has resorted to for reaching the same result, and the extent to which attaining the result sought is worth curtailment of freedom of expression.

It has been suggested that Federal employees are trading release from insecurity in exchange for loss of their political rights. One Congressman has observed that civil service employees "take the veil" in exchange for insurance against separation from the payroll. 84 *Cong. Rec.* 9602. As to other employees, he stated that without such a quid pro quo, they should not be compelled to surrender their constitutional rights of opportunity and free speech. Whatever the adequacy of the protection of the civil service employee against separation, there should be no necessity to surrender constitutional

rights to secure economic security.[4] But the Constitution and the basic principles of democracy do not offer citizens of this country merely their choice between two types of serfdom. There is every reason to believe that patronage in the Federal service, if deemed evil, can be eradicated; that coercion of political speech and action can be eradicated; that efficiency and the merit system can be advanced without, in any way, impairing the free exercise by government employees of their basic rights of freedom of speech. The method is clear: the devising of a technique to assure, in the words of the court below, that "the employment, promotion and dismissal of government employees" shall be made on bases having no relation to their political activities. Such a method can assure an efficient merit system without curtailing the rights of employees; that the present system may not now be perfect and that improving it may require thought and effort does not mean that government is free to drop its efforts to improve its system and adopt a blanket solution which controverts basic rights guaranteed by the Constitution.

B. Preservation of Security of Tenure and Promoting Efficiency of Service.

The ground urged most strongly by the Government and relied on by the court below is that section 9(a) of the Hatch Act does not curtail political rights, but on the contrary, protects them. It does so by protecting the government employee in the security of his tenure, by removing any occasion for infliction of reprisals by superior officers based upon the inferior officer's refusal to render political service or by his expression of opinion or activity on behalf of a political party or candidate obnoxious to the superior officer. And by so preserving the Federal employee in the security of his tenure, it promotes the efficiency of the civil service. This argument,

[4] Of course, the situation of a non-classified employee, not involved in this case, is even more precarious for there is no indication of quid pro quo to him for his surrender of basic rights other than the privilege of staying on the payroll at the will of his employer.

as presented below, assumed an unlimited power to dismiss in the appointing officer, in absence of limiting statute, and invited the further assumption that, *a Fortiori*, Congress possesses the power to do so by statute. These unwarranted and unsupported assumptions are discussed in Part III A, *infra*, pp. 50-53.

Obviously, the Hatch Act does curtail rights of expression of Federal employees, and can be said to protect them only in the fashion in which "protective custody" affords protection. A more candid formulation is that it is necessary to deprive Federal employees of a large measure of the rights of free expression enjoyed by other citizens in order to protect government workers in the enjoyment of the residue, without fear of dismissal or other reprisal. But is it in fact necessary to do so? Is the method utilized by section 9(a) necessary because there is no other way to protect tenure, or is it necessary in the sense that it is the most convenient and easiest for Congress to adopt, and achieves the most complete results in solving a problem by the simple expedient of wiping out the rights which create the problem? And is it in fact the case that a merit system of civil service can be preserved only at the price of severely limiting the rights of expression of civil servants?

Reflection serves to answer some of these questions, and history answers others. A merit system of civil service is indeed concerned with eliminating from the public service insecurity and inefficiency flowing from political causes. It seeks, however, to do so not by appeasing the appointing officer's pique, by barring inferior officers from activities which might provoke reprisal, but rather by limiting his powers of appointment and dismissal. For the kinds of political activity with which it is concerned are political favoritism in appointment to the exclusion of merit, coercion of political services and political contributions, and dismissals based on the *appointing officer's* desire to serve political ends such as making a spot available for a henchman, and not on the subordinate's expression of views. And the security which it seeks to promote is security flowing from elimination of political consider-

ations in appointing and dismissing actions of superior officers. So far as this affects political activity of subordinates it is designed to do so by establishing that political service or contribution shall lack efficacy as a consideration for appointment, and failure to render service or make contribution shall not be a cause or incentive for removal. It thus serves to make it clear that some motive other than desire to acquire or retain a public post should govern political activity of public servants, and not suppress such activity altogether. That such an approach is reasonably adapted to achieving the end of security of tenure is manifest from the fact that it has been employed in the Civil Service Laws and other Congressional legislation on the subject.

Even prior to the acceptance of a merit system, Congress had sought, in particular instances, to protect Federal employees in the enjoyment of their rights of expression against reprisals or dismissal occasioned by exercise of these rights. Thus, the Act of March 2, 1867, 34 U.S.C. Sec. 510, 14 Stat. 492, provides:

> No officer or employee of the Government shall require or request any workingman in any navy yard to contribute or pay any money for political purposes, nor shall any workingman be removed or discharged for political opinion; and any officer or employee of the Government who shall offend against the provisions of this section shall be dismissed from the service of the United States.

There is no evidence that "political opinion" in this section means the circumscribed and ineffectual expression of opinion divorced from a live context of a political campaign, permitted by the Civil Service interpretations embodied in section 9(a) of the Hatch Act. In any event, whatever the scope of the right, this statute makes it at least clear that Congress has on occasion protected security of tenure, not by suppressing rights, the exercise of which might invite reprisal by the superior, but rather by guaranteeing them and by limiting the superior officer's removal power when its exercise would infringe such rights.

Although some have failed to perceive it there, the Civil

Service Act itself clearly discloses an intent to promote security of tenure by curtailing the superior officer's removal powers when its exercise would result in curtailing rights of free expression and kindred rights of subordinate officers.

The Civil Service Act authorized the Civil Service Commission to aid the President in promulgating rules and regulations (5 U.S.C. Sec. 633(1)) and further required that (5 U.S.C. Sec. 633(2)):

> Among other things such rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:
>
> 5. *Contributions for political purposes.* Fifth. No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service and that he will not be removed or otherwise prejudiced for refusing to do so.
>
> 6. Political coercion by officers; distrimination due to marital status. Sixth. No person in said service has the right to use his official authority or influence to coerce the political action of any person or body . . .

The plainest instance of Congressional action to protect government workers in the exercise of their rights of expression by limiting official power to inflict reprisal and cause dismissal because of the exercise of those rights is the passage of the Lloyd-LaFollette Act of August 24, 1912, 5 U.S.C. 652, 37 Stat. 555, which forbids dismissal of Federal employees except for cause, and requires service of a written statement of the grounds for dismissal, and affording the employee an opportunity to reply.[*] It also guarantees to postal employees (and has been universally construed to apply to Federal employees generally) the right to join an employee's organization or union for the purpose of seeking betterment of conditions of employment and to petition Congress for the redress of grievances.

This statute was occasioned by the so-called "Gag Rules" of Presidents Theodore Roosevelt and Taft, the Executive

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[*] The statute thus embodies the substance of the Civil Service Rule which was rendered nugatory in the case of *U. S. ex rel Taylor v. Taft*, 24 App. D. C. 95, *infra*, pp. 52–53.

Orders of Jan. 31, 1902 and Jan. 25, 1906, which prescribed dismissals as a penalty for agitation by civil employees for an increase in wages, and the Executive Orders of Nov. 26, 1909 and April 8, 1912, which forbade communications to members of Congress save through the heads of Departments. See *Myers* v. *U. S.*, 272 U. S. 52, 263-264 n. The very purpose of the statute was thus to protect the freedom of expression of Federal employees and to prevent arbitrary dismissals.[8]

It may perhaps be contended that whatever the extent of the rights of Federal employees to engage in political activity and to express their views, as a practical matter it is impossible both to permit them to enjoy these rights and to achieve security of tenure. For superior officers could in any event exercise their dismissal power to inflict reprisals for political reasons, and any prohibition on this could be readily evaded by fabricating some other pretext.[9] And higher officials might condone the action or else not inquire into the sufficiency of the grounds advanced for the action taken. The courts, reluctant to be involved in such matters, might declare themselves powerless to intervene in details of internal management and fail to afford any rapid, effective remedy. Therefore the Federal employee would fare better to surrender the

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[8] It would be a grudging construction indeed to contend that the removal for cause limitation is not designed to achieve this result, and that the only liberty of expression protected by the Lloyd-LaFollette Act is the right of postal employees to join a union and to petition Congress or any member of Congress for the redress of grievances. And the legislative history of the course of the Act through Congress, as well as the immediate occasion for passing it, makes it evident that it could be so read only by a "jaundiced eye" insensitive to its obvious purpose. Representative Rouse stated "This provision simply places all employees (of the government) on the same footing with all other American citizens . . ." (48 Cong. Rec. 5080). And Representative Konop observed (48 Cong. Rec. 5207):

> "Any man in public service should have a right as a citizen to know why he is discharged from public duty . . . For years, American citizens under civil service in this free country have been denied the right to be heard . . . I do not believe that an American citizen when he enters the civil service should by that act lose his right as an American citizen."

See also remarks of Senators Reed, Poindexter, Jones, and LaFollette, 48 Cong. Rec. 10728-10733, and Senators Smith, Johnston, Sutherland, Martine, and Bourne, 48 Cong. Rec. 10790 *et seq.*

bulk of his rights of expression on political subjects, or have Congress do so for him, and to enjoy the meagre residue in peace and security.

But this counsel of appeasement can hardly serve as the showing of substantial justification necessary for the validity of incidental curtailment of rights of expression. For it has been demonstrated that rights of this character can be preserved. Comparable rights which at one time had an even more precarious existence have been effectively secured and protected by legislative action. Thus, it is notorious that at one time employees in private industry were dismissed or discriminated against solely because of their union membership or activity. Where that reason was not expressly given for dismissal, some other was easily improvised. However, Congress, by the passage of the National Labor Relations Act, made it unlawful for employers in industries affecting interstate commerce to discriminate against, or dismiss employees because of their union membership or activity, 47 U.S.C., Sec. 157, 158. And it set up a mechanism for the protection of these rights. By conscientious enforcement of the statute, the N.L.R.B. has given substantial protection in the enjoyment of these rights to a number of employees undoubtedly much larger than the total number of Federal workers, and under circumstances at least as difficult as any which could be presented by an unwarranted dismissal of a government employee for engaging in political activity on his own time, without coercion or other abuse of authority.

Whatever the specific means Congress might choose to adopt, it is at least clear that there are other methods at hand for protecting the security of tenure of Federal employees and preventing arbitrary dismissals. That devising these methods may involve painstaking care and analysis does not excuse Congress from making that effort. Indeed if it is at all possible to do so, the Constitution requires that the effort be made, and forbids resort to some sweeping prohibition needlessly destructive of basic rights merely because it is convenient.

C. Prevention of Coercion and Abuse of Authority

There are two other arguments generally made in defense of a wholesale prohibition on political activity of Federal workers. These the Government apparently found it unnecessary to present in detail below because of the tacit assumption of an unlimited power to legislate any condition to public employment, flowing from the supposed existence of an unlimited dismissal power, discussed in Section III, *infra*, pp. 50-53. The first of these arguments is that elimination of Federal employees from political activity serves to prevent coercion, favoritism, and other abuse. And in removing political pressures on Federal employees, it serves to protect the merit system and to preserve public confidence in the civil service. The second is that the creation of an impartial body of expert civil servants divorced from the political life of the nation could be depended on to serve faithfully whatever party may be in power. This would also create public confidence in the impartiality of administration and preserve the merit system by removing incentive from a victorious party to purge the civil service and place its own adherents in office. So far as danger of coercion, venality and partiality may be thought to endanger the merit system and undermine public confidence in administration, these two arguments raise the same problems and will be considered together. Since the aim of creating an impartial body of expert civil servants divorced from the political life of the nation also involves curtailing rights of expression even when there is no coercion or other abuse present or imminent, it will be separately considered.

A pervasive assumption in this field is the notion that political activity as such is an evil, and that participation in it can only corrode and corrupt, so that those most remote from it are truly blessed. It is readily understandable, in the light of the bitter battle for civil service reform, why writers on public administration should feel so. But the Constitution places limits upon the indulgence of this sentiment in legislation. For, as we have seen (pp. 16-18, *supra*) the right to engage in free expression on public measures, is basic to our system of government.

Since political activity as such is not an evil which the government may deal with as it sees fit, Congress must restrict its prohibitions to those forms of political activity which do create evils, such as coercion of inferior officers and members of the public, favoritism, and venality. It may well be contended that it is practically impossible to deal with the evils alone, without barring federal employees from substantial participation in political affairs. However, the body of legislation on this subject enacted prior to the Hatch Act indicates that Congress has carefully limited itself in the past to dealing with the evils themselves without extinguishing the rights. No showing has been made that the continuance or extension of that method of dealing with the evils will be ineffective and that the extinction of constitutional rights is essential. A mere examination of the broad scope of statutory regulations dealing with the above evils will indicate the extent to which they give promise of success in reaching the anticipated evils only, and they serve to show the lack of necessity for the blanket provisions of Section 9(a). Thus, in dealing with coercion by government workers directed against other government workers or private citizens and coercion of government workers by private citizens, Congress has scrupulously observed the limitation that legislation of this character must be appropriately designed to suppress the evil without also infringing on constitutionally protected rights. Indeed, the primary purpose of legislation in this field has been to insure the opportunity for the exercise of their constitutional rights by government employees as well as other citizens, free from coercion, intimidation, and improper use of authority by others. There are obvious methods of preventing improper political activities. Amongst these is the punishment of those who actually engage in them. Cf. *Schneider* v. *New Jersey*, 308 U. S. 147, 162.

Prohibition on the use of official authority for political purposes is but one aspect of the general principle that a public officer or employee shall not derive private advantage and gain from the prestige or power of his office. Numerous statutes exist which prohibit the exploitation for private gain of the opportunities which may be created by public office.[1]

[1] 5 U.S.C. Sec. 243 (prohibits the Secretary of the Treasury from

In the hierarchy of government administration, superior officers enjoy authority over their subordinates, which may be so extensive as to include the power to dismiss. Just as the federal government seeks to protect the members of the public from improper exercise of authority and opportunity by any public officer or employee, so it seeks to protect subordinates in the exercise of their rights of expression from coercion and intimidation by superiors.[8]

In dealing with possible coercion which may be applied in the solicitation of funds for political purposes, Congress has recognized that coercion and intimidation may be applied to federal employees not only by superiors,[9] but also by other government employees,[10] and by private persons who may seek

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being concerned or interested in carrying on the business of trade or commerce); 31 U.S.C. Sec. 155 (*Id.* as to Treasurer of the United States); 31 U.S.C. Sec. 163 (*Id.* as to Register of the Treasury); 12 U.S.C. Sec. 11 (unlawful for Comptroller or Deputy Comptroller of the Currency to be interested in National Banks); 43 U.S.C. Sec. 11 (officers, clerks, and employees in General Land Office prohibited from being interested in purchase of public lands); 28 U.S.C. Sec. 373 (unlawful for United States judges to be engaged in the practice of the law); 28 U.S.C. Sec. 249 (unlawful for members of Congress to practice in Court of Claims); 22 U.S.C. Sec. 38 (diplomatic officers prohibited from transacting business involving trade with country to which they are accredited); 18 U.S.C. Sec. 192 (prohibits officers collecting or disbursing public revenues from trading in public obligations or public property); 18 U.S.C. Sec. 193 (prohibiting judges and other court officers from purchasing claims for fees of witnesses, etc., at less than their face value); 18 U.S.C. Sec. 198 (prohibits officers and employees in legislative and executive departments from prosecuting or being interested in claims against the United States); 18 U.S.C. Sec. 201 (unlawful to use money appropriated by Congress to pay for personal service to influence member of Congress with respect to legislation); 18 U.S.C. Sec. 202 (prohibits Congressmen and government officers from taking consideration for procuring contracts with the government); 18 U.S.C. Sec. 203 (prohibits Congressmen and other government employees from taking consideration for services rendered in connection with any matter pending before any government agency); 18 U.S.C. Sec. 204 (prohibits members of Congress from being interested in government contracts. Declares such contracts void).

[8] 34 U.S.C. Sec. 510 (quoted *supra*, p. 24).

5 U.S.C. Sec. 113 (prohibits government workers from soliciting other government workers for gifts for superiors; also prohibits the making of a contribution and the receiving of a gift).

[9] See 34 U.S.C. Sec. 510.

[10] 18 U.S.C. Sec. 208; 18 U.S.C. Sec. 211.

to solicit them in their capacity as government workers.[11] Significantly, Congress has not imposed an absolute prohibition on solicitation of political contributions of government employees by private individuals, but has limited the prohibition to solicitation on government property. *See U. S. v. Thayer*, 209 U. S. 39. Nor indeed, is the government employee prohibited from making political contributions to persons who are not government employees if he desires to do so.[12]

Examination of the statutes cited in connection with the foregoing discussion reveals that they are framed in such terms as to preserve the rights of government employees to participate in political activity when no coercion, intimidation or abuse of authority is created thereby, and fall within the permissible limits of the government's power to regulate the political activity of its employees. These limits were extensively discussed in the case of *Ex Parte Curtis*, 106 U. S. 371. In that case the Supreme Court held valid a statute prohibiting certain officers of the United States from requesting, giving to, or receiving from, any other officer money or other thing of value for political purposes. The Supreme Court made it clear that this result was reached on the ground that the prohibition was a proper exercise of the government's power and was not an unreasonable limitation upon the civil rights of the employees subject to the provision. Thus, Chief Justice Waite, speaking for the Court, stated (pp. 371-372):

> "The act is not one to prohibit all contributions of money or property by the designated officers and employees of the United States for political purposes. Neither does it prohibit them altogether from receiving or soliciting money or property for such purposes. It simply forbids their receiving from or giving to each other. Beyond this no restrictions are placed on any of their political privileges."

Indeed, the very ground of the decision of the Court is that government officials may not properly make contributions to

[11] 18 U.S.C. Sec. 209 makes it unlawful for any person to solicit political contributions from government employees on government property.

[12] 18 U.S.C. Sec. 210 provides that no government employee shall suffer official reprisal for giving or withholding political contributions.

political causes which they may espouse a condition to continued employment. But the Chief Justice also makes it clear in this connection that the curtailment of such an evil must not entail suppression of the rights of government employees to participate in political activity. Thus he stated (p. 375):

> "Political parties must almost necessarily exist under a republican form of government; and when public employment depends to any considerable extent on party success, those in office will naturally be desirous of keeping the party to which they belong in power. The statute we are now considering does not interfere with this. The apparent end of Congress will be accomplished if it prevents those in power from requiring help for such purposes as a condition to continued employment."

Mr. Justice Bradley in dissenting from the opinion of the Court did not at all dispute the premise of the majority that the power of the government to regulate the employment relationship was limited to reasonable regulations. Thus he stated (p. 378):

> "The legislature may, undoubtedly, pass laws excluding from particular offices those who are engaged in pursuits incompatible with the faithful discharge of the duties of such offices. That is quite another thing.
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> "The legislature may make laws ever so stringent to prevent the corrupt use of money in elections or in political matters generally, or to prevent what are called political assessments on government employees or any other exercise of undue influence over them by government officials or others. That would be all right. That would be clearly within the province of legislation."

Justice Bradley dissented from the judgment of the Court on the sole ground that in his opinion the statute in issue trespassed beyond the agreed limits of the proper powers of the government to suppress substantial evils, and infringed upon fundamental civil rights of Federal employees.

In contrast with the second sentence of section 9(a) of the Hatch Act, Sections 1 through 8 of that Act, 18 U.S.C. secs. 61-61g, and the first sentence of section 9(a) are well within these permissible limits of legislation on political abuses. The major purposes of the Hatch Act were to insure that the authority and funds of the federal government would not be improperly used to affect state and national elections, and that

no person, whether or not a government employee or recipient of federal funds, would be coerced by any other person in the exercise of his right to vote in a national election. Congress quite properly recognized, at least in sections 1-8, of the Hatch Act, that the achievement of these objectives entailed the imposition of prohibitions on intimidation, coercive activities and improper use of government authority and funds, not only by government employees but also by private citizens. Thus, a political boss, not employed by the government, could nevertheless coerce persons in their right to vote by representing that he is able to secure federal employment or benefits for them. Similarly, he could intimidate government employees by representing that he is able to bring about their dismissal. Congress, therefore, was concerned with evils which were not caused solely by the conduct of government employees as such, nor, indeed, could be solved by regulating the activities of government employees alone. Clearly, in dealing with these evils, it could not suppress the rights of private citizens by as sweeping a prohibition as the second sentence of section 9(a).

In fulfilling the purposes of the Hatch Act, Congress aptly extended the prohibitions on coercion, intimidation, and improper use of official authority and federal funds to all persons, whether or not federal or other governmental employees. Thus, section I of the Act makes it unlawful for *any person* to intimidate or coerce *any other person* for the purpose of interfering with the right of such other person to vote in connection with an election for President, Vice President, Presidential electors, or members of Congress.

Similarly, sections 3 and 4 of the Act, which deal with coercion and intimidation of voters by promises of federal employment or work or relief benefits, or threats to deprive any person of such employment or benefits, are not restricted to federal employees, but are applicable to *any* person. In like fashion, sections 5 and 6, which prohibit political solicitation of recipients of federal work or relief benefits, and disclosure of any list of such recipients for political purposes, are applicable to *any person* and not to government employees alone.

Section 2 and the first sentence of section 9(a) are appropriately limited to government employees, since these sections

deal with the use of official authority by such employees for the purpose of interfering with elections. Section 2 makes it unlawful for persons employed in administrative positions in the United States government, including government corporations, to use their official authority for the purpose of interfering with elections for President, Vice President, Presidential electors, or members of Congress. Violation of section 2 is made a criminal offense by section 8 of the Act. The first sentence of section 9(a) forbids persons employed in administrative positions in the United States government to use their official authority for the purpose of interfering with any election whatsoever. The penalty for violation of this section is dismissal from office as prescribed by section 9(b).

Since the subject of improper political activity is so thoroughly covered in legislation which is scrupulously designed to reach the evils without suppressing proper exercise of political rights, the sweeping prohibition of section 9(a) can find no justification in the claim that it deals with evils. For it has been shown that the evils can be separated from the rights. No showing has been made that it is impossible to do so. And, under those circumstances, the Constitution requires that the separation be made. *De Jonge* v. *Oregon*, 299 U. S. 353, 364-365; *Thomas* v. *Collins*, 323 U. S. 516, 540-541.

D. "Political Neutrality" as a Device for Preservation of Purity and Impartiality of the Civil Service

1. The prohibition of Section 9(a) is designed to preserve the "Political Neutrality" of Federal employees. The argument which has been most widely urged in favor of an absolute ban on participation by government employees in political affairs, even when no coercion or other abuse is present or imminent, is that such an absolute prohibition is necessary to create an impartial body of civil servants which could be depended upon to serve faithfully and impartially, and whatever party the public may place in power. The existence of such a body of impartial civil servants would also serve to protect and perpetuate the merit system by discouraging a victorious party from purging the public service and placing its own adherents in office. For it would have the assurance of

knowing that a competent body of experts was at hand to do its will and carry out its policies faithfully without conflict or breach of faith occasioned by loyalty to some other party. This is the ground most widely urged by writers on public administration and personnel problems."[12]

Indeed, this is the very ground which gave rise to the prohibition that no Federal employee in the classified civil service "shall take any active part in political management or in political campaigns" and its sweeping interpretation by the Civil Service Commission. Theodore Roosevelt, while Civil Service Commissioner, coined this language, in the belief that application of such a rule to the federal civil servant "prevents him from turning his official position to the benefit of one of the parties in which the whole public is divided; and in no other way can this be prevented," and that only by refraining from political activity can the civil servant serve the whole public."[13] This language of prohibition was formally embodied in Civil Service Rule I, Section 1, in 1907, while Theodore Roosevelt was President.[14]

This body of opinion on the indispensability of enforcing "political neutrality" is quite formidable. In addition, the circulars of earlier Presidents exhorting Federal officeholders to refrain from an active role in elections have cited in its support. And the practice of Great Britain and Canada has also been relied upon. Indeed, were any interest here involved other than a freedom given express constitutional protection, a legislative judgment that it is desirable to have an "impartial" body of civil servants divorced from the political life of the notion could hardly be challenged. When, however, an almost total sacrifice of effective freedom of expression on political issues by nearly all government workers, without re-

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[12] See: White, *Government Career Service* (1935), 78 *et seq.*; Dawson, *The Principle of Official Independence* (1922) 93–94; Wei-Kiung Chen, *The Doctrine of Civil Service Neutrality in Party Conflicts in United States and Great Britain* (1937); Kirchheimer, "The Hatch Law", in *Public Policy* (ed. C. J. Friedrich, 1941), 353; Finer, "Civil Service" in III *Encyclopedia of The Social Sciences*, 522.

[13] Eleventh Annual Rept. of the Civil Service Commission (1894), 20–21.

[14] Twenty-fourth Annual Rept. of the Civil Service Commission (1907), 9. The formula appears to be an expansion of more restricted language which did not encroach on rights of expression, used by President Hayes. See note 36, *infra*.

gard to the character of their positions, is deemed necessary to achieve this result, a grave political judgment as to the form of our government is made, which passes beyond the limits of regulating conditions and tenure of government employment and resolving conflicting interests in that area. And this judgment trenches into an area where the Constitution already embodies another political judgment about the form of our government, that enjoyment of the most complete freedom of expression by all citizens is indispensable to its preservation. The creation of this body of politically neutralized "impartial" civil servants must therefore be justified, like any other incidental encroachment on that vital freedom, by a substantial showing of the existence or imminence of an evil so grave that its suppression can be achieved only in that way and that it is worth the resulting incidental curtailment of rights of free expression of an extensive body of citizens.

This substantial showing cannot successfully be made in support of the validity of the prohibition of section 9(a). This is so, not because the government cannot preserve impartiality where there is a vital interest in doing so, but because section 9(a) applies to so wide a variety of employees that the impartiality of many of these is a matter of complete indifference to the effective performance of their functions in the Federal service. The actual diversity of the nature of duties and functions embraced in the public service is too often lost sight of by authorities on public administration. And in their reaction to the "spoils system" they lose sight of the grave political judgment involved in the creation of a body of "impartial" civil servants cut off from the political life of the nation. They also misconceive the actual character of the foreign experience, of Great Britain, of Canada. Finally, this theory of political neutrality was not the basis on which Congress originally enacted, and the President, on August 2, 1939, signed the Act embodying Section 9(a). The theory of political neutrality for all government workers was imported by Congress, without any serious consideration of its consequences, into section 9(a) by the enactment of Section 15 on July 19, 1940, which made the

Civil Service Commission's interpretations the content of Section 9(a). These points will be discussed.

2. The actual diversity of the kinds of employment within the civil service makes the prohibition obviously indefensible as to some classes of employees. Writers on civil service matters are prone to assume a Dante-like picture of the civil service as a host of administrative officers similarly occupied in making policy or assisting in doing so and steadily working their way through the various grades of the service. In truth, the civil service is not a unified hierarchy of administrative officials slowly aspiring upward to positions of increasing responsibility with wider latitude of discretion. As of August, 1945, there were 2,795,213 persons employed in the Executive branch of the Federal government.* Only a small fraction of these are engaged in positions of direct contact with and authority over the public, such as Collectors of the Revenue, Postmasters, Immigration Inspectors, United States Attorneys, Marshals, F.B.I. and Treasury Agents. Another small portion occupy positions which involve disposition of private interests. These include officers delegated adjudicatory, licensing, or other dispensing powers by cabinet and agency heads, hearing officers, trial attorneys, claims adjusters, etc. Another group is comprised of professional and administrative officers who supply data and assist in the formulation of policy. But the largest number of Federal workers do not fall into any of these categories. Thus, there is a large body of administrative personnel which includes filing clerks, machine operators, and typists. Another large body of employees is comprised of service employees, messengers, elevator operators, charwomen, maintenance men. Yet another large group is employed in industrial and other enterprises which the Government itself operates, such as navy yards, arsenals, the Government Print-

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* United States Civil Service Commission, Monthly Report of Employment, Executive Branch of the Federal Government *(August, 1945)*. In this report, a total of 983,532 is reported in the category of "wage" employees, as distinguished from "salaried" employees.

The Report for April 1944, when this action was filed, discloses a total 2,850,585 employees, with 1,783,923 salaried employees, 916,624 wage employees, and the remainder in other categories.

ing Office, the Mint. Many of these are employed as laborers, machinists, typesetters, welders, etc."

The interest in preserving impartiality of the Federal employee varies widely from group to group. It is a matter of grave public importance whether a Collector of the Revenue is fair and impartial in the discharge of his duties. For he possesses extensive powers over members of the public and enjoys a wide range of discretion in their exercise. But the public interest in the impartiality and fairness of plaintiff Tempest, a welder in the Philadelphia Navy Yard, or plaintiff Poole, a roller in the Mint, can hardly be said to be comparable. Indeed, the welder's duties do not differ in any essential respect from that of a similar employee in Cramp's shipyard next door and the matter of Government employment of the welders in the Navy Yard is an accident." Similarly, others who happen to be employed in the locale of policy or decision making, have absolutely nothing to do with the process except to aid it mechanically and in a wholly incidental fashion. Thus a typist, filing clerk, mimeograph operator, charwoman, or maintenance man has no real part in the essential business of government so far as it is concerned with making and enforcing policy. And the public interest in the impartiality of such a Federal employee is hardly greater than its interest in the impartiality of the elevator operators or charwomen in the Old Willard building or the Shoreham building, where government agencies lease space.

In the light of these wide variations in duties and responsi-

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[11] The detailed breakdowns in the employment reports cited in note 16, *supra*, show that most of the wage employees work in the War and Navy Departments. These departments maintain such establishments as navy yards, ordnance factories, clothing factories, supply depots, etc.

[12] As to similar employees of the Admiralty, The Report of the Committee on Parliamentary Candidature of Crown Servants, CMD 2408 (1925), stated (p. 32):

> It can, we think, fairly be said of these men that in the sense of this report, their Government employment is an accident. Their general conditions of employment are governed by the craft or trade to which they belong: they are primarily craftsmen of that trade; and they are separated in organization and constant contact from the Departments staffed by those who would everywhere be primarily regarded as Servants of the Crown.

bility for public policy and its fair enforcement, a restriction reasonably designed to preserve the impartiality of a Collector of the Revenue, a U. S. Marshal, an F.B.I. or Treasury agent may be utterly absurd and unjustified when applied to a lens grinder, a stock clerk, a machinist, or an elevator operator. It is therefore impossible both to observe reasonable regard for constitutional rights and to enact sweeping prohibitions as to political rights applicable to all Federal employees whatever the nature of their duties. In dealing with so complicated and varied a subject matter, a hatchet cannot readily be substituted for a scalpel.

If, indeed, promotion of fairness and impartiality, and preservation of public confidence in the civil service are ends sought by section 9(a), the exemptions create a paradox. For the officers of government, outside of the judiciary, who enjoy the most extensive adjudicatory powers and who are the top policy makers, are exempt. These are the heads and assistant heads of the Executive Departments, and officers appointed by the President with the advice and consent of the Senate who determine policies pursued in Nation-wide administration of Federal laws. The resolution of this paradox is easy. Congress has quite properly recognized that these offices are essentially political so far as they involve formulating and carrying out of those policies which are endorsed by the people in their selection of the President and Congress. And while the interest in fair administration is great, it can be achieved in other ways, by the appointment of men of stature and honor, by judicial review of administrative determinations, or by public scrutiny and pressure applied by way of Congressional inquiry and other means. Here Congress apparently balanced the end of impartiality against the end of adequate representation of prevailing popular will by high policy makers. But it did not go on to balance the public interest in impartiality of a navy yard welder or a Veterans Administration stock clerk against the interest in preservation of those employees' rights of free expression and participation in political affairs. Or if it had done so, it did not give those interests of the employees the measure of consideration which the Constitution requires.

3. The practice in Great Britain and Canada lends no support to a general requirement of political neutrality on the part of all government employees without regard to their duties. The practice of the British Civil Service, so often cited in favor of the imposition of an absolute prohibition on political activity by all government employees does not in fact support such a conclusion. For the British practice is by no means as sweeping in its scope as is supposed. For it at least distinguishes between those obviously not administrative officers engaged in formulating policy, like dockyard workers of the Admiralty, and those who are. No general prohibition on political activity by all government employees is embodied in any statute or regulation." And the practice from Department to Department varies widely, with due regard accorded to the type of position occupied. Thus, industrial dockyard employees may make political addresses and act as campaign manager." A postman in the lower grade may undertake canvassing work at election times when not on duty and not in uniform." And there is widespread feeling among civil servants and others, that any extensive limitation on activities of minor servants enjoying no policy-making authority are outmoded and unreasonable."

Although the Canadian limitation on political activity of government employees appears to be substantially identical with section 9(a) of the Hatch Act" in application it is not.

" Report of the Committee on Parliamentary, etc., Candidature of Crown Servants, CMD 2408 (1925), p. 8. At best there exists only a vague unwritten custom that civil servants are to maintain "a reserve" in political matters. See Kingsley, *Representative Bureaucracy* (1944), 223; Brown, *The Civil Service, Retrospect and Prospect* (1943), 39.

" Report . . . on Candidature of Crown Servants, *supra* note 19, at p. 12.

" *Id.* at p. 9.

" Report on Candidature of Crown Servants, *supra* note, 12–15, 24–25. Kingsley suggests that emphasis on limitation of political rights of civil servants is tied up with trends toward curtailment of civil liberties generally. *Representative Bureaucracy* (1944), 223. See also Memorandum on Practice in New South Wales, where it is observed that extension of the Civil Service to include a large body of citizens raises serious doubt about the desirability of excluding a large body of qualified citizens from participation in political affairs. Report . . . on Candidature of Crown Servants, *supra* note 19, p. 17.

" There is reason to believe that the Canadian political activity ban,

For that limitation does not apply to all government employees, and workers on government railroads enjoy the same political rights as workers on privately owned railroads."

4. The history of the American Civil Service affords no justification for imposing a general requirement of "political neutrality" on all government employees. The sentiment that the Civil Service should consist of a body of dedicated persons who have renounced all connection with political affairs in order to insure purity and impartiality of administration on a high level of technical efficiency, is by no means universally shared by writers on public administration. Some writers, who endorse the view, perceive that a sweeping prohibition applicable to all employees is evidently unjustifiable as applied to minor non-policy making civil servants such as clerical and technical employees." Other writers are more critical of the view itself, and are sensitive to the far-reaching social and political consequences of divorcing civil servants from participation in political affairs." Thus, one of these, Sayre, recognizes that the principle of political neutrality is but one of many devices which may be chosen to insure that civil servants will faithfully execute policy; that the so-called "spoils system" is another such device, aimed at the same end, however wastefully and inefficiently; and that total deprivation of political rights of civil servants is not indispensable to the workings of an efficient merit system.

A good deal of the zeal for purity and the failure to reckon all the consequences of political "neutrality" exhibited by writ-

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Civil Service Act of 1918, sec. 32, Can. Stat. 8-9, Geo. V. C. 12, sec. 32, was adopted under the influence of our own Civil Service Commission's Rule I, Sec. 1. For in 1918, when the ban was introduced a body of American experts had been called in to revise the Canadian Civil Service. See Dawson, *The Principle of Official Independence* (1922), 77.

" Report . . . on Candidature of Crown Servants, supra note 19, at p. 20.

" See Kirchheimer, "The Hatch Law" art. in *Public Policy* (ed. Freidrich and Mason, 1941), 356-57.

" See Sayre, "Political Neutrality", art. in *Public Management in the New Democracy* (ed. Morstein Marx, 1940), 202 et seq. Sayre's views on this subject are entitled to especial weight because of his experience as a Civil Service Commissioner of the City of New York. See also memorandum on practice in New South Wales, cited in note 22 *supra*. Cf. grounds urged for the passage of Section 21 of the Hatch Act, *infra* note 45.

ers on the subject is obviously traceable to a reaction to the "spoils system" and a dread of the possibility of a reinstatement of all the abuses associated with that opprobrious epithet. But this marked emotional reaction is not conducive to clear vision. For, as in the case of other like honorific terms, the strongly implied moral judgment obscures the relevant facts. Writers in using the term "spoils system" apply it without distinction to what, in its inception in our nation's history, was not merely a mendacious device for paying off party workers after victory. This is the notion of rotation of offices, which was rather a theory of government seriously entertained by such eminent thinkers as Bentham and Jefferson, that when the locus of political power shifted markedly from one class or group to another, as from the aristocracy to the middle class, the machinery of government should be placed in the hands of members of the ascendant group, for representatives of the ousted group could not be depended upon to carry out faithfully policies hateful to them." In addition, Jackson believed that public duties should be simple and within the competence of ordinary citizens to discharge, so that many citizens could in turn hold public office." Jackson himself disclaimed use of this view solely as a device for distributing patronage, and observed that "the indiscriminate removal of public officers for a mere difference of political opinion is a gross abuse of power." "

The gross abuses developed nevertheless, for the theory of government was early lost sight of, and the search for patronage by the party supporters became an end in itself and a

" See Schlesinger, *The Age of Jackson* (1945) 46–47. It is of interest to note that it was Jefferson, and not Jackson, who first applied this notion in exercising the appointing power. Fish, *The Civil Service and the Patronage* (1905), 51. Contrary to the popular legend fostered for partisan purposes, Jackson applied the idea with moderation and did not turn the Federalist officeholders out wholesale. Schlesinger, *id*, at p. 47. And Jefferson, too, exercised restraint. Fish, *id*., at pp. 38–39; *Civil Service Commission Form 2449, History of the Federal Civil Service* (1941), 9.

" Schlesinger, supra note 27, at p. 47. This was indeed the theory and practice of classical Athenian democracy. Finer, "Civil Service", art. in III *Encyclopedia of the Social Sciences*, 515.

" Quoted in *Civil Service Commission Form 2449, supra* note, 27, at p. 21.

reward for bringing political victory, indeed the very aim of victory. At this point the evils which we associate with the term "spoils system" seeped into government. For the precarious tenure of those already holding office impaired their efficiency in discharging their duties. And the new appointee might be utterly incompetent to do the job awarded as his prize. In addition the cares of dispensing patronage harassed the Executive. The merit system was a reaction from these evils, and was designed to deal with these abuses. The major objectives were to make appointment to office unavailable as prizes for party work, and to insure appointment of competent personnel secure from arbitrary dismissal. It is readily understandable how reformers, stalwartly fighting for these objectives in the face of the most intense opposition engendered in the unbridled self-seeking politics of the post Civil War period, should have become readily disposed to regard all political activity as an unmitigated evil, without realizing that the merit system itself was a most important political issue of the day, and their efforts to establish it political activity. They were not fighting to deprive federal employees of civil rights, but rather to improve the administration of government. To the extent that any supposition was made that the two must be necessarily related, it was a reaction clouded by the smoke of battle, and not the product of reflective analysis.

Similarly, the significance of the circulars of a number of Presidents relating to political activity of federal officeholders has been misconceived. These have been removed from the context of their own day, and have been given significance in the light of a civil service of quite different composition and governing principles. Thus, the court below has cited as a precedent for imposing the general prohibition of Section 9(a), a circular presumably issued by President Jefferson, admonishing Federal officeholders not to "attempt to influence the votes of others nor take any part in the business of electioneering." [*] In its contemporary setting, this was however, not a measure to insure political neutrality in order to promote efficiency or

[*] R. 123-124. A text of this circular and its provenance are set out in X Richardson, *Messages and Papers of the Presidents* (1899), 98-99.

public confidence in administration, but rather an effort to curtail activities of political opponents permitted to retain office. For appointments and removals were then on a political basis.[41] However, no clean sweep of the Federalist officeholders had been effected, and most were permitted to retain office.[42] Many of these were not at all content to exercise a reciprocal restraint out of regard for the magnanimity of the victors.[43] In addition, it must be noted that the officeholders at which it was aimed were predominantly such officers enjoying extensive authority over members of the public as revenue and customs collectors.[44] It is equally of significance, that the statute proposed in 1839, in connection with which the Jefferson circular is cited in Richardson (*supra* note 30), applied only to certain classes of Federal offices such as marshals, postmasters, and revenue collectors, and forbade efforts of such officials to influence and control elections.[45] No effort was made to cover humbler types of public employment remote from official authority. Influencing an election may also then have had a quite different meaning, since voting was open and not by secret ballot.

President Hayes' executive order of June 22, 1877, was carefully designed to prohibit only certain activities, and to preserve full rights of free expression subject only to the entirely reasonable proviso that such exercise "does not interfere with the discharge of their official duties." [46] President Cleveland's

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[41] *Supra* note 27.

[42] *Supra* note 27.

[43] On August 28, 1802, Jefferson wrote to Elbridge Gerry concerning the Federalist officeholders "after a twelve months' trial I have at length been induced to remove three or four of those most marked for their bitterness and active zeal in slandering and electioneering." Quoted in Fish, *The Civil Service and the Patronage* (1945), 38.

[44] Gallatin had earlier proposed a similar circular directed against electioneering revenue collectors, most of whom were Federalist, but because of political exigencies, it was never issued. Fish, *supra* note 27, at p. 43.

[45] Wei-Kung Chen, *supra* note 13, at pp. 69–70.

[46] VII Richardson, *supra* note 30, at pp. 450–451. The prohibition is that "no officer should be required or permitted to take part *in the management* of political organizations, caucuses, conventions, or election campaigns". Whether or not this language passes permissible constitutional bounds, it is at least clear that, reasonably interpreted, it is far more limited than the language of Section 9(a) as interpreted by the

letter, addressed to public officers, showed a similar regard for rights of expression of public employees."

The notion of political "neutrality" as a device for insuring efficiency and public confidence in administration emerges as an articulate concept in Theodore Roosevelt's administrations as Civil Service Commissioner, and later as President (*supra*, p. 35). But for all of his eminence as a civil service reformer, his sponsorship of these notions cannot promote their acceptance. He did not always display sensitivity for the civil rights of Federal employees, and it was he who first imposed the "Gag Rules" which Congress found to be destructive of civil servants' rights of expression as American citizens (*supra*, pp. 25-26).

The Presidential circulars do not therefore reveal a progressive and unbroken aspiration to remove Federal employment out of the sphere of politics by imposing a requirement of political "neutrality" on all Federal employees. Most of them show in the context of their day, rather an effort to neutralize the political efforts of incumbents of important offices, such as revenue collectors, of the opposite party, under circumstances where appointment and dismissal were on a political basis, but the administration had not made a clean sweep of members of the opposite party from office. None of them prior to the predecessor of section 9(a), Civil Service Rule I, Sec. 1, disclose any effort to deprive all Federal employees, however insignificant their jobs, of freedom of expression on political issues.

5. The legislative background of the Hatch Act reveals no facts demonstrating the necessity for imposing a general

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Civil Service Commission. For the Commission has taken the transitive "in the management of . . . political organizations . . . or election campaigns" and has made a substantive out of it, giving it wider content than taking an active, leading part in running these activities, and including in its expanded scope such activities as making a public address, writing a letter to the papers, which the Hayes' order evidently permitted.

" Quoted in VIII Richardson, *supra* note 30, at p. 494. It is of interest to note that it has been contended that President Cleveland was partial in the enforcement of the requirement of "impartialjty" and enforced it more rigorously against campaigning Republican officeholders. See Wei-Kiung Chen, *supra* note 27, at p. 79.

requirement of "political neutrality." The legislative backgrounds of the Hatch Act itself makes it clear that the investigation of the Sheppard Committee, on the basis of which the Hatch Act was enacted, developed no facts demonstrating the necessity for imposing an absolute requirement of "political neutrality" on all Federal employees. The Hatch Act had its origins in events relating to the primary and general elections of 1938. It had been charged that in a number of localities, notably Kentucky and Pennsylvania, federal relief funds were being utilized by certain officials to influence the outcome of elections. For the purpose of determining the truth or falsity of these and associated charges and recommending appropriate remedial legislation, the Senate, on May 27, 1938, by S. Res. 283, 75th Congress, Third Session, set up the Special Committee to investigate Senatorial Campaign Expenditures and Use of Government Funds. Thereafter, the authority of the committee was enlarged by the passage of Senate Resolution 290, 75th Congress, Third Session, on June 16, 1938.

Wherever the committee came upon political activities, not coercive in character or otherwise involving abuse of official power, carried on by government employees on their own time, it deemed such activities to be wholly proper. Thus, in the case of Frank S. Revell, District Commission of Immigration and Naturalization at Baltimore, charged with taking an active part in a senatorial primary campaign, the Committee reported:

> ". . . in the case of Frank S. Revell, it does not appear that he made any attempt to influence or coerce any Federal employee and that his activity consisted of expression of his support of Senator Tydings to citizens and residents of Maryland, particularly in his own county of Anne Arundel. In this activity the committee finds no grounds for criticism." (S. Rept. No. 1, Pt. 2, 76th Cong., 1st Sess., 1939, p. 134.) [*]

It is clear not only from these instances but also from the entire body of the Sheppard Committee report that the committee did not regard every manifestation of political activity on the part of a Federal employee as improper *per se* and

[*] See also *id.* at p. 21.

therefore either presently unlawful or else an evil to be dealt with by further legislation. What the Committee did regard as improper were such activities as use of official time for political purposes;[8] a supervisory employee's assembling of subordinates during official time to inform them of his position on a primary election;[9] solicitation of Federal officers or employees by other Federal officers or employees;[10] and coercion of Federal employees, relief workers and others whose salaries are derived in whole or in part from funds appropriated by Congress by such means as improper use of authority on the part of supervisory employees to order political activity on official time or to induce a particular mode of registration or voting by promises of benefits and favors or threats of dismissal or deprivation of benefits.[11]

Thus, the Sheppard Committee did not purport to uncover evils warranting nor did it recommend, a general stricture on political activities by Federal employees, when such activities are carried on during the employee's own time and are untainted by coercion, oppression, or other abuse of official power.

President Roosevelt signed the Hatch Act only after expressing the belief the Act was constitutional if it were so interpreted as not to preclude government employees from their rights of free speech.[12]

The legislative history of the Hatch Act thus fails to show that Congress even after a thorough investigation of situa-

[8] See the *Salisbury Postmistress* case, S. Rept. No. 1, Pt. 2, 76th Cong., 1st Sess., 1939, pp. 113–120.

[9] See the case of the *Maryland Internal Revenue Collector*, S. Rept. No. 1, Pt. 2, 76th Cong., 1st Sess., 1939, pp. 103–110; See also *Id.* pt. 1, p. 32.

[10] See S. Rept. No. 1, Pt. 1, 76th Cong., 1st Sess., 1939, pp. 8–10.

[11] See S. Rept. No. 1, Pt. 1, 76th Cong., 1st Sess., 1939, pp. 11–32.

[12] 84 Cong. Rec. 10745–10746. In his message, he stated (p. 10746):

> The genesis of this legislation lies in the message of the President of January 5, 1939, respecting an additional appropriation for the Works Progress Administration. I said in that message: It is my belief that improper political practices can be eliminated only by the imposition of rigid statutory regulations and penalties by the Congress, and that this should be done . . . My only reservation in this matter is that no legislation should be enacted which will in any way deprive workers of the Works Projects Administration Program of the civil rights to which they are entitled in common with other citizens.

tions where the most extreme types of interference in elections by Federal employees were claimed to exist, had before it any facts demonstrating the necessity for a sweeping prohibition of the rights of Federal employees to take part in political affairs as private citizens on their own time without coercion or other abuse.

6. The requirement of "political neutrality" is not indispensable to a merit system, and its consequences bring it into conflict with the purposes of the Bill of Rights. "Political neutrality" is, as we have seen, but one device of many for securing a faithful body of expert civil servants earning public confidence. And far from being the indispensable condition of an efficient merit system of civil service enjoying security of tenure, it is something in addition. For the heart of a merit system and the basis of public confidence in it are the initial selection of competent persons on the basis of merit and the promotion of their efficiency, security, and independence by eliminating arbitrary dismissals."

Most of the writers on public administration fail to reckon the price which must be paid for this neutral body of experts ready to serve any party which may come to power. It is, of course, difficult to determine precisely the consequences of imposing a blanket prohibition on the active participation of nearly 3,000,000 citizens in the affairs of government. It is not at all difficult to perceive, however, that they are not likely to be salutary. Civil service positions, with but few exceptions, require educational qualifications. In addition, many positions require college and professional training. Thus, what is perhaps the largest single well-defined group of citizens thoroughly equipped to participate intelligently in the political processes of government is barred from doing so." Such a

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" See Dawson, *Principle of Official Independence* (1922), 88. Dawson himself points out that the principle of impartiality, or dismissal for active political partisanship was itself the subject of abuse in Canada:

> This rule which appeared to make for political purity in reality brought political corruption, and had the unintended result of producing a special Canadian type of spoils system (p. 90).

" Every sound reason against imposing a sweeping prohibition on political activity of Federal employees generally was reflected in the reasons given as the basis for the enactment of Section 21 of the Hatch

wholesale disqualification of any group from the full rights of citizenship is likely to have an unfavorable effect upon all citizens. Federal employees will be regarded by others as wards of the government who have surrendered their civil rights for security and paternal care of the sovereign, designed to protect them from evils to which other citizens may be safely exposed.

Act, 18, U.S.C. sec. 61 (u), 56 Stat. 986, exempting employees of publicly supported educational or research institutions from the coverage of Section 9(a). Senator Brown in urging enactment of Section 21, stated:

> I state two reasons for my advocacy of this bill. First, I think it is wrong to take out of political life one of the most beneficial elements in it, the teaching profession. They are high-minded people; they are students of the science of politics and government, and the people of my State and all other States are entitled to the benefit of their opinions and their active participation in politics. (S. Rept. No. 1348, 77th Cong., 2nd Sess. (1942) p. 2.)

Prof. Donald Du Shane of the National Educational Association, was quoted by the Senate Committee in its report on the section as follows:

> "Why teachers should be excluded:
>
> 1. Teachers belong to a profession which disapproves of, and does not engage in, pernicious political practices and they should continue to be good citizens without the Hatch Act.
>
> 2. This act is discriminatory in that it applies to some teachers and not to others.
>
> 3. The Hatch Act interferes with the freedom of teachers to discuss political issues freely and without Federal political control or censorship. In order to train our youth for understanding and participation in American political life it is of vital importance that the teachers' freedom to teach the truth shall not be interfered with.
>
> *4. If teachers are to train effectively our youth for citizenship they must have full rights of citizenship themselves.*
>
> 5. American public schools are dependent upon the understanding and loyalty of our citizens for their financial support and their development and improvement. Very often questions involving the welfare of the schools are issues in political elections. Frequently candidates who are enemies of education run for political office. The integrity, and often the very existence of schools, depends upon the political activity of members of the teaching profession. It is part of their professional obligation to keep the needs and problems of the schools before the voters of their communities and States.
>
> 6. Under the Federal Constitution the management and control of education is a State function. A comparison between American schools and those of totalitarian countries would seem to indicate the wisdom of local and State control of education. *The partial disfranchisement and the muzzling of local and State teachers by the Federal Government is as unnecessary and unjustifiable as it is dangerous and alarming.*" (S. Rept. No. 1348, 77th Cong., 2nd Sess. (1942), pp. 2-3.) (Italics added.)

It is also likely to have an adverse affect on the neutralized Federal employees themselves. For enjoying no substantial rights to engage in political affairs they may well become complacent of infliction of similar deprivations on other classes of citizens. "The will to freedom, like the will to power is a habit, and it perishes of atrophy." [*]

The First Amendment embodies a judgment that Congress shall not be free to decide for itself that achieving purity of administration in the public service is worth a substantial curtailment of rights of expression of government employees. The pursuit of some types of perfection is precluded by the Constitution when their attainment requires suppressing rights of free expression. The observation of Mr. Justice Bradley, dissenting, in *Ex Parte Curtis* 106 U. S. 371, in concluding a discussion completely applicable to the prohibition of Section 9(a), is especially pertinent here. He stated that (106 U. S. at 378):

> We are not unfrequently in danger of becoming purists, instead of wise reformers, in particular directions; and hastily pass inconsiderate laws which overreach the mark they are aimed at, or conflict with rights and privileges that a sober mind would regard as indisputable. It seems to me that the present law, taken in all its breadth, is one of this kind.

III. THE GOVERNMENT AS EMPLOYER IS LIMITED BY THE BILL OF RIGHTS AND ENJOYS NO ABSOLUTE POWER TO ATTACH ANY CONDITION WHATSOEVER TO FEDERAL EMPLOYMENT.

A. The Argument Based on Security of Tenure Improperly Assumes an Unlimited Power of Dismissal.

The theory most heavily relied on by the Government and the court below was that the substantial limitation of federal

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[*] Laski, *Liberty in the Modern State* (Penguin Ed., 1937), 169. Sayre, *supra* note 26, at p. 217, states:

> "The career merit system cannot be built upon a base of sub-citizens, nor should restraints upon political activities of public employees, except for certain categories, differ from restraints which apply to all citizens."

employees' rights of expression on political subjects is designed to protect the tenure of government workers and thereby promote efficiency of service. It does so by removing occasions for the infliction of reprisals by a superior officer based on the inferior's refusal to render political service or on his activity in behalf of a political candidate, party, or measure which is objectionable to the superior. In the absence of any statute, the argument continues, appointing officers possess unlimited powers of removal, and could dismiss on any ground whatsoever, including engaging in political activities and expression of opinions on political personalities. The conclusion is suggested that if in absence of statute appointing officers could dismiss on this ground, Congress by statute could do so, and certainly could pare down the officers' power to do so, and limit it to specified types of political expression or activity.

Thus, although the government below did not baldly argue that the federal government as employer has plenary powers unbounded by the Bill of Rights or that since federal employment is a privilege it may be conditioned as the government sees fit, it invited a tacit acceptance of these conclusions. It reached the same result by arguing that in absence of any express statutory limitation, federal appointing officers possessed unlimited powers to dismiss. The implication which it seeks to have drawn from the existence of this supposed power in federal officers is that *a fortiori* Congress possesses the same power. And short of fully exercising that power, it may surely impose any conditions whatsoever for continued employment with the government. Therefore, when once it is assumed that federal officers possess an utterly unlimited power of removal, the government's conclusions in this case seem to follow, whether stated in terms of an unlimited power to impose conditions or the reasonableness of the end sought. The gravity of the conclusions makes imperative the most careful examination of the assumptions.

If indeed the government as employer does enjoy a boundless power to impose conditions on federal employment uninhibited by the Bill of Rights, no condition however discriminatory or obnoxious to the guarantees of freedom of expres-

sion or religion could be successfully challenged. For in that event, the government need not show that the limitations on free expression imposed by the Hatch Act are reasonably necessary to preserve the merit system, to prevent coercion of inferior officers or members of the public, or to avert any other substantial evil which the government may suppress. It need only show that the limitations concern incidents of federal employment.

No case holds that an appointing officer acting under authority derived from a federal statute may arbitrarily use his authority to abridge freedom of expression or freedom of religion by refusing to hire or by dismissing on these grounds. There are cases which hold that in absence of limiting statute, an appointing officer possesses the power to dismiss, and that the tenure of the appointed officer is then at the will of the appointing officer. *In re Hennen*, 13 Pet. 230. It is also well established that with respect to inferior offices created by Congress, that body may limit the power to dismiss of the appointing officer. *U. S.* v. *Perkins*, 116 U. S. 483; *Myers* v. *U. S.*, 272 U. S. 52, 127, 161. Congress may also limit the President's power to dismiss officers appointed by him with the consent of the Senate where the officers perform quasi-judicial functions. *Humphrey's Executor* v. *U. S.*, 295 U. S. 602.

However, the existence of a power to remove at pleasure, where Congress has not limited it, simply establishes that the Constitution does not affirmatively require the setting up of a merit system. It does not at all establish that Congress itself, or an appointing officer deriving statutory authority from Congress, may enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.

The case of *U. S. ex rel Taylor* v. *Taft*, 24 App. D. C. 95, has been relied on for the proposition that in absence of statute appointing officers enjoy an unlimited power to dismiss, which may be exercised where an inferior employee has expressed opinions on political subjects and distasteful to the superior. That case does not survive analysis, has been in effect over-

ruled by the same Court, and should therefore be written off the books. In that case a clerk in the classified civil service employed in the War Department was dismissed without a statement of cause after she acknowledged that she was the author of a newspaper article signed in her name which was derogatory to the President. The Civil Service Rules then provided that no removal shall be made except for just cause served in writing on the employee, and after an opportunity to answer. The Civil Service Act provided that no employee in the public service shall be removed for failure to make political contributions or render political services. The court denied the clerk relief on the grounds that Congress never intended to limit the power of removal except for failure to contribute money or services to a political party, and that "the entire policy of civil service has been to restrict the power of appointment, not removal, because once the right to appoint is restricted within certain defined classifications, the reasons for political removals has ceased." (24 App. D. C. 98.)

The same court has recently held that a department head cannot arbitrarily dismiss an employee in violation of established regulations and that a court is empowered to grant relief against such arbitrary action. *Borak* v. *Biddle*, 141 F. (2d) 278 (U. S. App. D. C.), certiorari denied 323 U. S. 738. And the history of the Civil Service Act and the merit system effectively refutes the notion that the Act was not intended to limit arbitrary powers of removal. See the review of that history by Mr. Justice Brandeis in *Myers* v. *U. S.*, 272 U. S. 52, 279-295.

B. Cases Holding That There Is No "Property Right" in a Public Office Do Not Establish That the Government Has an Unlimited Power as to Its Employees.

Another line of argument utilized to secure acceptance of the conclusion that Congress may condition federal employment as it pleases without regard to the limitations of the Bill of Rights is based on a series of cases gathered under the deceptive catchword that there is no property right in a public office. For these cases do not at all deal with the question

whether the government, federal or state, in regulating the incidents of public employment may without infringing the First Amendment or the equal protection and due process clauses of the Fourteenth, pass such a statute as one providing that no Negro or Jew may be eligible for any public office or that any government employee who engages in organizing religious revival meetings shall be dismissed. Nor do they deal with the question whether a government employee adversely affected by such a statute may secure equitable or other judicial relief to vindicate his rights under the Constitution. These cases are rather concerned with two quite different questions. One is whether a court of equity is the proper forum for inquiring into particular cases of exercise of administrative discretion in appointment and removal or whether some other forum is more appropriate. The second is the extent to which federal courts will inquire into exercise by state legislatures of the authority to change the incidents of a public office or to abolish it altogether.

One group of cases does hold that a court of equity is not the appropriate forum to review the exercise of administrative discretion by the executive branch of the government in the exercise in particular cases of the powers of appointment and dismissal. *In re Sawyer*, 124 U. S. 200; *White* v. *Berry*, 171 U. S. 366; cf. *Walton* v. *House of Representatives*, 265 U. S. 487.

In the case of *In re Sawyer*, 124 U. S. 200, a state officer sought the intervention of a federal court of equity to restrain proceedings for his removal. The majority of the court, in an opinion written by Mr. Justice Gray, held that traditionally a court of equity entertained no jurisdiction over the appointment and removal of public officers, that the jurisdiction to determine title to a public office belongs exclusively to the courts of law, and is exercised by such procedure as certiorari, mandamus, prohibition, or quo warranto.

Chief Justice Waite in dissenting said (p. 223):

> "I am not prepared to decide that an officer of a municipal government cannot under any circumstances, apply to a court of chancery to restrain the municipal

> authorities from proceeding to remove him from his office without authority of law. There may be cases in my opinion, when the tardy remedies of quo warranto, certiorari, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremedial mischief."

Justice Harlan in dissenting with the Chief Justice recognized the jurisdiction of federal courts to entertain suit for injunction where the plaintiff alleges a deprivation of rights secured to him by the Constitution (124 U. S. at p. 224).

The positions thus taken in the case of *In re Sawyer, supra*, are enlightening as to the significance of the holding in *White* v. *Berry*, 171 U. S. 366. In that case plaintiff, a Treasury employee, sought equitable relief on the ground that he was dismissed by defendant, a Collector of Internal Revenue, because he was a Democrat. Defendant stated that plaintiff was not removed from office, but was relieved from duty at a certain distillery, that this was in pursuance to a department policy of rotating assignments to prevent collusion. Writing for the court, Mr. Justice Harlan held that a court of equity would not interfere with the exercise of administrative discretion in the appointment and assignment and removal of federal officers, and that officers claiming wrongful removal must seek their relief by other remedies in actions at law such as mandamus or quo warranto. He was careful to state that this did not mean that a federal officer was utterly remediless against injury inflicted by an unconstitutional enactment. For he repeated with approval the statement of Chief Justice Waite in the *Sawyer* case quoted above, and added that the exercise of administrative discretion in appointment and removal did not fall within the class of cases in which a court of equity would afford injunctive relief to a federal officer.

The second group of cases cited for the catchword that there is no property right in a public office concerns the extent to which the federal courts will review action of the state legislature or state officers in administering statutes regulating selection and tenure of officers when it is claimed that action in a particular case results in denial of rights guaranteed by the

Fourteenth Amendment. This group of cases includes: *Wilson* v. *North Carolina*, 169 U. S. 586; *Taylor and Marshall* v. *Beckham* (No. 1), 178 U. S. 548; *Cave* v. *Newell*, 246 U. S. 650; *Snowden* v. *Hughes*, 321 U. S. 1.

In *Wilson* v. *North Carolina*, 169 U. S. 586, it was contended that a state statute, and action of the governor under it in suspending a railroad commissioner from office deprived that officer of rights guaranteed by the Fourteenth Amendment. The highest state court had held that the statute was valid and the governor's action was proper. This court held that under these circumstances no federal question was presented. The court stated (p. 593):

> "The procedure was in accordance with the constitution and laws of the State. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. . . . The fact would have to be most rare and exceptional which would give rise in a case of this nature to a federal question."

And this Court went on to quote with approval its language in *Allen* v. *Georgia*, 166 U. S. 138, 140, that:

> "The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference." (Quoted at 169 U. S. 593.)

This Court concluded that (p. 596):

> "The jurisdiction of this court would only exist in case there had been, by reason of the statute and the proceedings under it, such a plain and substantial departure from the fundamental principles upon which our government is based that it could with truth and propriety be said that if the judgment were suffered to remain the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution."

Similarly, in *Taylor and Marshall* v. *Beckham* (No. 1) 178 U. S. 548, the question presented was whether a determination by the General Assembly as to which candidates were properly elected in a contested election proceedings taken under a state statute, deprived the unsuccessful candidates of

any rights guaranteed by the Fourteenth Amendment. This Court in holding that no federal question was presented stated that (p. 574):

> "We do not understand this statute to be assailed as in any manner obnoxious to constitutional objection, but that plaintiffs in error complain of the action of the General Assembly under the statute and of the judgment of the state courts declining to disturb that action."

In stating that the right to hold office is not a property right, the Court was simply stating that the right to hold office is subject to the authority of the legislature to prescribe the mode of selection, the incidents, and the tenure of the office. The unsuccessful claimant to office therefore is deprived of no right of property when a decision adverse to him is made pursuant to statute (see 178 U. S. at p. 575). And the incumbent in absence of express constitutional provision possesses no vested right which precludes the legislature from changing the incidents of office or abolishing it. See *Crenshaw v. U. S.*, 134 U. S. 99, 104.

But these cases do not decide that where a statute on its face arbitrarily bars a class of citizens from office or attaches an arbitrary and unreasonable condition to public employment, such action would not result in a deprivation of constitutional rights. This is made clear by the case of *Snowden v. Hughes*, 321 U. S. 1. In that case it was contended that the failure of a state canvassing board to certify petitioner as a successful candidate for a state office deprived him of rights guaranteed by the Fourteenth Amendment. The Court in holding that no federal question was presented, pointed out (p. 7):

> "There is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the board was making any intentional or purposeful discrimination between persons or classes."

In the light of these cases the proposition that there is no property right in an office amounts to no more than that in-

cumbency in office creates no vested rights which are paramount to the regulatory authority of the legislature to change the incidents of office and that non-discriminatory state action which deprives a claimant of an opportunity to hold office presents no federal question. Thus the notion that there is no property right in a public office does not at all support a conclusion that the government, state or federal, may condition public employment as it pleases, and that there would be no judicial redress available to applicants or officeholders adversely affected by arbitrary action. Indeed, Mr. Justice (then Chief Judge) Cardozo reached the contrary result in *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195.

In that case, Section 14 of the New York State Labor Law prohibited employment of aliens in the construction of public works. Violation was made a misdemeanor. Crane, the defendant, contracted with the City of New York to construct sewer basins for it. He employed alien laborers. His defense to prosecution for violating Secton 14 of the labor law was that the statute was unconstitutional because it discriminated against *aliens*. In finding that aliens could be barred from employment with the government, on the ground that the latter may give preference to its citizens, who have an interest in the common property of the government which aliens do not have, Justice Cardozo pointed out that discrimination against *citizens* as employees of, or contractors with, the State would be unlawful:

> In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the State. (*Smith* v. *Texas*, 233 U. S. 630, 638). We do not hold it may discriminate among its citizens on the ground of faith or color. (*Strauder* v. *West Virginia*, 100 U. S. 303; *Gibson* v. *Mississippi*, 162 U. S. 565; *Rogers* v. *Ala.*, 192 U. S. 226, 231.) A citizen may not be disqualified because of faith or color from service as a juror. (*Strauder* v. *West Virginia*, supra.) For like reasons we assume that he may not be disqualified because of faith or color from

serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. (*Strauder* v. *West Virginia*, *supra*, at p. 305)."

C. The Government Possesses No Unlimited Power to Attach Conditions to Privileges Without Regard for the Constitution.

Although it has frequently been asserted the government may condition the grant of a privilege as it pleases, no cases decided by this Court, uphold any such sweeping claim. Examination of decided cases dealing with the conditioning of privileges conferred by the government reveals that the courts when they uphold the condition, do so on the basis that the condition is a reasonable one, not infringing on constitutional rights, within the power of the government to impose. Thus the restriction of employment with the government to citizens, and the exclusion of aliens from such employment has been upheld on the ground that this is a reasonable distinction, and involves no unreasonable discrimination. *People* v. *Crane*, 214 N. Y. 154; *Crane* v. *New York*, 239 U. S. 195; *Heim* v. *McCall*, 239 U. S. 175."

" This conclusion is reinforced by the holding of the Court in *Truax* v. *Raich*, 239 U. S. 33. In that case it was held that an employee at will of a private employer was entitled to secure the enjoining of the enforcement of a statute which threatened his employer with imprisonment if he employed more than 20 percent of alien employees in his establishment. Raich was an alien, and was therefore subject to the threat of dismissal from his employment. The Court held that the statute was unconstitutional as a denial of the equal protection of the laws to Raich, and of his liberty in violation of the due process clause of the Fourteenth Amendment. But Raich's right to work, and his employment at will are no more property rights than the right to work for the government. Yet an obvious discrimination against aliens in the field of employment generally, when the government has no special interest in or justification for barring aliens (Cf. *Crane* v. *New York*, 239 U. S. 195; *Clarke* v. *Deckenbach*, 274 U. S. 392), was held to involve an unconstitutional deprivation of liberty and a denial of the equal protection of the laws.

" The power of a state to forbid the existence of Greek letter fraternities in a state university, and expel students who join such fraternities

In *Hamilton* v. *Board of Regents*, 293 U. S. 245, the Supreme Court upheld the right of the State of California to impose as a condition to attendance in the state university, the requirement that all students shall take prescribed courses in military training. In his concurring opinion, Mr. Justice Cardozo carefully pointed out that the state and federal government enjoy the authority to compel all citizens to bear arms, and this authority does not infringe on religious liberties enjoying constitutional protection. For conscientious objectors are exempted from the requirement to bear arms as a matter of legislative grace, and not by virtue of the constitutional protection of freedom of religion. This was also the ground of decision in *In re Clyde Wilson Summers*, — U. S. —, 89 L. Ed. 1304 (decided June 11, 1945), where this Court upheld the authority of a state to exclude conscientious objectors from admission to the bar. See also *West Virginia* v. *Barnette*, 319 U. S. 624, 632.

Nor indeed does the proposition that the government may attack any condition it pleases to government employment, even the surrender of rights enjoying constitutional protection, find support in the frequently repeated but rarely analyzed statement of Mr. Justice Holmes (then Chief Justice of the Massachusetts Supreme Court) in the case of *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 29 N. E. 517, that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." For the ordinance involved in that case provided that: "No member of the department shall be allowed to solicit money or any aid, on any pretense, for any political purpose whatever." And it was limited to policemen, officers who concededly may enjoy extensive official authority over members of the public, and was not a general prohibition on all political activity involving only exercise of rights of expression of government employees, including those who enjoy no such authority. Mr. Justice Holmes made it clear, as the entire context of the extracted language reveals, that the government is limited to imposing *reasonable*

in violation of the statute, has been upheld on the ground that such a statute is a reasonable regulation designed to promote discipline on the campus. *Waugh* v. *Mississippi University*, 237 U. S. 589.

conditions to government employment, and that in his opinion the particular restriction was a reasonable one. Thus, the entire statement is:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us unreasonable, if that be a question open to revision here."

It is evident that Mr. Justice Holmes was saying no more than that the employee surrenders his right or freedom to engage in any activity whatsoever which would prevent him from discharging his official duties during his hours of employment, or any activity at any time which may be reasonably judged inconsistent with his official status or authority. But this in part follows from the elementary physical fact that a man cannot be in two places at the same time or perform two different activities at the same time. When the policeman is out on the beat he is expected to patrol, and not to engage in exercise of his rights of free expression. But by the same token he is not to be in church worshipping. It cannot then be said that he has surrendered or bargained away his legal right to go to church during his own time as a private citizen. The suspension of these rights during his hours of duty, is thus not equivalent to a legal restraint which forbids these activities when he is physically free to engage in them, and when no injury to the state or other citizens would occur from his performance of these acts. It is therefore a gross fallacy to state that an employee bargains away basic civil rights when he accepts employment in the government, when it is only the case that he is bargaining away some of the time in which he might otherwise physically engage in the exercise of these rights, and that he is subjecting himself to all lawful statutes and regula-

tions which are designed to prevent abuse of the opportunities which employment with the government may afford him. And a total prohibition of his right to solicit funds when he enjoys a position of extensive authority over the public is such a reasonable regulation.

Mr. Justice Holmes recognized that the federal government could not constitutionally curtail all rights of government workers to engage in political activity in *U. S.* v. *Thayer*, 209 U. S. 39. That case involved a conviction under the statute prohibiting solicitation of government workers for political purposes on government property. The conviction of the defendant, who had written a letter soliciting funds for political purposes to a government worker, addressed to him at his office, was upheld under the statute. In commenting upon the purpose and scope of the statute, Mr. Justice Holmes stated (pp. 42-43):

> "The purpose is wider than that of a notice forbidding book peddling in a building. It is not, even primarily, to save employees from interruption or annoyance in their business. It is to check a political abuse which is not different in kind, whether practiced by letter or word of mouth. The limits of the act, presumably, were due to what was considered the reasonable and possibly the constitutional freedom of citizens, whether officeholders or not, when in private life, and it may be conjectured that it was upon this ground that an amendment of broader scope was rejected."

Mr. Justice Bradley, dissenting in the case of *Ex parte Curtis*, 106 U. S. 371, 376, made this clear in the following statement, unquestioned by the majority opinion:

> "The offices of the government do not belong to the Legislative Department to dispose of on any conditions it may choose to impose. The legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties: but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States, and not to Congress; and every citizen having the proper qualifications has the right to accept office, and to be a

candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights."

The conclusion that the government in attaching conditions to the grant of a privilege which it may withhold is restricted to imposing reasonable limitations which do not offend constitutional guarantees is supported by cases dealing with the second-class mailing privilege.

In the case of *Pike* v. *Walker*, 73 App. D. C. 291, 121 F. (2d) 39, it was urged that since the second-class mailing privilege is a privilege which the government may grant or withhold, it may revoke the privilege without observance of constitutional guarantees. This argument, however, was rejected by the court, which stated in its opinion:

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office, the people have no definite rights reserved by the First and Fifth Amendments of the Constitution." (73 App. D. C. p. 291, 121 F. (2d) 39).

The Court also quoted with approval the language of Mr. Justice Brandeis in his dissenting opinion in *U. S.* ex rel. *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 430, in which he said that the power of Congress over the postal system "like all its other powers, is subject to the limitations of the Bill of Rights." On these grounds, the Court of Appeals for the District of Columbia made it amply clear that merely because the second-class mailing privilege was a privilege conferred by the government it could not be arbitrarily dispensed or withheld without regard to the limitations of the Bill of Rights. Thus the Court also said:

"We think it is equally clear, and it is so stated in the Coyne case, that even Congress is without power to extend the benefits of the postal service to one class of person and deny them to another of the same class."

In the case of *Esquire, Inc.* v. *Walker* (U. S. App. D. C., June 4, 1945), petition for certiorari filed Sept. 4, 1945, which squarely raises the same issue, the Court of Appeals applied the conclusion which it reached in the *Pike* case and held that the Postmaster General could not so exercise his discretion in administering the second class mailing privilege as to enforce compliance with his literary standards, and thus abridge rights of free speech guaranteed by the First Amendment.*

It is therefore abundantly clear that the supposition that Congress may deal with Federal employees as it pleasas, with-

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* Nothing decided in the case of *Perkins* v. *Lukens Steel Company*, 310 U. S. 113, impairs the conclusion that the government in attaching conditions to privileges is limited by the Bill of Rights. In that case potential bidders for a government contract sought to enjoin the Secretary of Labor from continuing in effect an administrative determination made pursuant to the Public Contracts Act defining the "locality" in which prevailing wages must be paid by holders of contracts for manufacture of steel for the government. The potential bidders contended that the determination made by the Secretary was unreasonable and arbitrary. This Court held that a potential bidder for a government contract possessed no legally protected interest which would entitle him to challenge in the courts the reasonableness of the Secretary's determination. It must be noted further that the attack was based on the contention that the Secretary had abused her administrative discretion under the statute, rather than that the statute itself was unconstitutional. Since the case was decided on the issue of the potential bidder's standing to sue, any remarks of the Court in passing, on the unlimited power of the government as purchaser cannot be taken as over-ruling any of the holdings of the Court that the government in the exercise of its granted powers is limited by the Constitution. Nor indeed, as we have seen, was the issue presented that the governing statute, under which the Secretary acted, exceeded the permissible limits of the government's powers under the Constitution.

It appears from the opinion of the Court that it was saying no more than that the government in purchasing its supplies was to be permitted a wide area of latitude in the exercise of its administrative discretion. It can hardly be supposed that anything said in the *Lukens* case would be determinative of any issues arising from the enactment of a statute which discriminated between Democrat and Republican, Christian and Jew, or White and Negro, in the cancellation of government contracts already obtained, in effecting dismissal from government employment, or even in foreclosing the opportunity to obtain such contracts or employment.

out regard to the express prohibitions of the Bill of Rights is wholly lacking in substance.

CONCLUSION

The second sentence of section 9(a) of the Hatch Act, clearly, and on its face, abridges rights of expression of plaintiffs as well as almost all employees in the executive branch of the Federal government without substantial justification, and is therefore repugnant to the Constitution. Therefore, appellant respectfully submits that the judgment of the court below should be reversed.

Respectfully submitted,

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DEC 3
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 20

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.) et al., *Appellants*

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMMING, *Appellees*

REPLY BRIEF FOR APPELLANTS

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ERRATUM, NOTE: On page 60 of appellants' main brief, the last sentence of the quotation from Mr. Justice Holmes' statement should read: "This condition seems to us reasonable, if that be a question open to revision here."

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No. 34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.) et al., *Appellants*

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMMING, *Appellees*

REPLY BRIEF FOR APPELLANTS

I. THE DISTRICT COURT PROPERLY ENTERTAINED JURISDICTION OF THE ACTION SINCE IT PRESENTS A TIMELY CONTROVERSY.

The Government contends that the court below should have dismissed the actions for lack of jurisdiction on the grounds that they involve a subject matter which is not within the cognizance of a court of equity and that no case for a declaratory judgment is presented because the actions are premature (Govt. br. pp. 13-18). The court below held that a controversy ripe for adjudication was presented by the actions of the individual appellants, and found it unnecessary to pass on the standing of the plaintiff organization, United Federal Workers of America (R. 116-122). Appellants did not assign as error the court's failure to pass on the substantiality of interest of plaintiff United Federal Workers of America (R. 128-129). Accordingly, it is not an issue in this appeal. The Government took no cross appeal from the determination of the court below that a controversy was properly presented in the

actions of the individual appellants. However, the issue of jurisdiction is, of course, open to re-examination here. *U. S. v. Corrick,* 298 U. S. 435. Since this issue has been raised in this case, which brings in question the validity of an Act of Congress, it is of the utmost importance to dispel any doubts as to the jurisdiction of the court below. Application of every element of the requirement of a case or controversy to the facts in this case reveals that a matured controversy is presented, and that it is the very type of controversy in which remedy by way of declaratory judgment and injunction is appropriate.

The elements of a case or controversy are: existence of a legally recognizable or protectable interest in the plaintiff; existence of genuine adversity between plaintiff and defendant; and existence of present injury or impact creating a timely controversy, and not a premature anticipation of possible future injury. *Nashville C. & St. L. Ry. Co. v. Wallace,* 288 U. S. 249; *Aetna Insurance Co. v. Haworth,* 300 U. S. 227. These requirements are clearly satisfied in the present case.

A. Appellants Interests in Enjoying their Constitutional Rights of Freedom of Expression and continuing in the Federal Employment Unhampered by Unconstitutional Restraints are Legally Recognizable Interests.

The first condition for crossing the threshhold of a court of equity is that plaintiff assert an interest which is entitled to legal protection. This condition is here satisfied, for the rights asserted by plaintiffs are ones which have been accorded protection by courts of equity. Two rights of plaintiffs are jeopardized by the statute challenged. The first is the right to engage in political activity as an expression of the constitutional rights of freedom of speech, press, and assembly. The second is the right to continue in government employment without being subjected to deprivations and threats imposed by unconstitutional statutes.

It is well settled that a court will entertain and consider the merits of a suit against a threatened invasion of the civil

rights of a citizen where the threat is made by officials presently acting or threatening to act pursuant to an unconstitutional statute or where the right asserted may be invaded or entirely lost in consequence of the exercise of official authority. Thus in the case of *Perkins* v. *Elg.*, 307 U. S. 325, modifying and affirming 99 F. (2d) 408, it was held that the civil right of a citizen to be free from the threat of arrest and deportation based on an official assertion that the petitioner was not a citizen was an interest which could be judicially protected in injunction and declaratory judgment proceedings. Clearly rights of expression given explicit protection by the Bill of Rights are interests which may be preserved against unconstitutional infringements by judicial action. *Hague* v. *C.I.O.*, 307 U. S. 496, 519.

The second sentence of section 9 (a) presents appellants with these clear alternatives. If they exercise rights of expression in connection with political activity they must lose their jobs. If they desire to retain their jobs, they must lose their rights of expression. If the prohibition exceeds constitutional bounds, they are being punished with deprivation of office for exercise of constitutional rights, and their tenure is being conditioned by the requirement that they surrender these rights. Even in absence of invasion of rights expressly protected by the Constitution, the interest of a Federal employee in enjoying his tenure free from invalid interference is entitled to judicial protection. *Borak* v. *Biddle*, 141 F. (2d) 278 (App. D. C.), certiorari denied 323 U. S. 738; see also *Cummings* v. *Missouri*, 71 U. S. 277, 320, 321, 322.

These interests are invaded not by specific exercises of administrative discretion claimed to be invalid, taken under a statute admittedly valid, but rather by the statute itself, which is invalid on its face. The Government's reliance on such cases as *White* v. *Berry*, 171 U. S. 366 (Govt. br., p. 15) is therefore misconceived. Whatever the scope of jurisdiction of a court of equity to pass on specific instances of exercise of administrative discretion under valid statutes, it is clearly within the province of equity jurisdiction to afford protection to legally recognized interests against invasion by unconstitutional enactments.

B. Genuine Adversity of Interest Exists between the Individual Appellants and the Civil Service Commission.

In the court below the Government contended that the actions seeking a determination of the invalidity of the second sentence of section 9 (a) presented no controversy with the Civil Service Commission, which enforces as to classified employees, not section 9 (a), but its own Rule I, Section 1.

The Government, however, now quite properly abandons this contention (Govt. br. pp. 13-14). For the prohibition of Rule I, Section 1 is substantially identical in terms with the second sentence of section 9 (a) and the very same acts are prohibited under both (R. 45). And the punishment of dismissal prescribed by section 9 (b) for violations of sections 9 (a) is mandatory for violations of Rule I, Section 1. 40 *Op. Atty. Gen.* No. 2 (Jan. 8, 1941); *Op. Compt. Gen.* B-51708 (Sept. 14, 1945). But prior to the enactment of Section 15 of the Hatch Act on July 15, 1940, which made the interpretations of the Civil Service Commission under its Rule I, Section 1 part of the content of section 9 (a), the Commission retained a discretion to impose penalties less than dismissal for infraction of the rule. The enactment of section 15, however, superseded this discretion with the mandatory requirement of dismissal of section 9 (b). 40 *Op. Atty. Gen.* No. 2 (Jan. 8, 1941).

The Civil Service Commission may, without action by the agency head, impose this penalty as to employees in the classified civil service by application of its Rule XV (Appellants' main br. p. 4). It therefore possesses the power to inflict the injury against which appellants seek relief. Failure to join as party defendants the heads of the employing departments who also possess authority to dismiss, is as the Government concedes (Govt. br. p. 14) not a jurisdictional defect. Rules 19, 20, 21 of the *Federal Rules of Civil Procedure.* Since, as will be shown below, the Commission threatens to apply the statutory penalty to appellants and all other classified employees generally, and has instituted proceedings to cause the dismissal of appellant Poole, adversity between appellants and the Civil Service Commission clearly exists.

C. The Statute Inflicts Present Injury on the Appellants and thus Creates a Timely, Matured Controversy.

Existence of a controversy ripe for adjudication requires not only the presence of an interest entitled to legal protection, but also the existence of, or present threat of, such substantial injury to the interest that judicial relief is presently required and is not prematurely sought. *Nashville C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249; *Aetna Insurance Co.* v. *Haworth*, 300 U. S. 227. This requirement is satisfied in the present case. The statute challenged carries a substantial penalty of deprivation from office, the infliction of which would cause substantial injury. Even when not inflicted in specific cases, the statutory prohibition and penalty have the present effect of deterring lawful conduct, and thus inflict the injury of deprivation of constitutional rights. Since the validity of the statute itself is challenged, no requirement of exhaustion of administrative remedies is applicable. These points will be fully developed.

1. Substantial Injury Is Inflicted by the Statutory Penalty.

The penalty imposed for commission of any of the acts prohibited by the second sentence of Section 9 (a) is immediate dismissal from office, prescribed by section 9 (b). Dismissal from office has been held to be a punishment, and dismissal worked by an unconstitutional statute to be injury against which a court will afford protection. *Cummings* v. *Missouri*, 71 U. S. 277, 320, 321, 322.

To secure an injunction to prevent the infliction of substantial injury by the application of a penalty under an unlawful statute, it is not requisite that the penalty be the infliction of a criminal sanction. It suffices that the penalty is the loss of a valuable privilege or interest. In *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407, the plaintiff network organization sought to enjoin the Network Regulations promulgated by the Federal Communications Commission on the ground that the threat embodied in these regulations of refusal to renew the radio station licenses of affiliated stations who retained contracts with networks, containing features

found by the Federal Communications Commission to be contrary to the public interest, deterred the affiliates from retaining such contracts, and caused them to cancel the contracts, thus creating immediate financial loss to the network organization and threatening its future disruption. It was held by this Court that the injury threatened to the network organization, flowing from the conduct of the affiliates induced by fear of the sanction of denial of the station license in the future was sufficient to give the network organizations standing to seek equitable relief, by way of injunction against the application of the regulations alleged to be invalid.

2. The existence of the Prohibitions of the Statute and the Penalty for Violation Inflicts Present Injury to all Appellants, Against Which a Court of Equity May Grant Relief.

The Government concedes (Govt. br. p. 14, note 6) that the actual institution against appellant Poole of enforcement proceedings which can have but one outcome causes the legal rights asserted by him to be "threatened with imminent invasion by appellees," as in *Railway Mail Association* v. *Corsi*, No. 691, October Term, 1944. It contends, however, that the actions of the other individual appellants are premature in absence of their performance of the acts prohibited and institution of specific proceedings for dismissal against them. This contention is, however, without merit, and results from confusing the present situation with one in which the precise meaning and application of a general statute cannot be determined prior to its interpretation and application in specific cases.

Unlike the statute involved in *Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term 1944, the acts specifically forbidden and the persons to whom the prohibition of the second sentence of section 9 (a) applies, are definite and unambiguous. If any of appellants should write to a newspaper and endorse a candidate for office as one who supports the legislative program of U.F.W.A., and as one whom the U.F.W.A. seeks to have elected to office, the application of the statute would not be contingent upon any administra-

tive interpretation as to whether this is an act covered by the statute. Similarly, the other acts which appellants desire to do in exercise of their rights of expression are quite definite, and the application of the statute to them quite clear.

Nor does any possiblity exist of holding the specific applications of the second sentence of section 9 (a) separable, as was the case in *Watson* v. *Buck*, 313 U. S. 387. That case is indeed authority for the proposition that the second sentence of section 9 (a) is itself separable from the other provisions of the Hatch Act. For Section 11 of the Hatch Act, 18 U.S.C., sec. 61 k, the separability clause, provides that if any provision of the statute or applications to any person or circumstance is held invalid, the remainder of the statute shall not be affected thereby. The scope and purpose of the second sentence of Section 9 (a) are clearly distinct from the remainder of the Act (Appellants' main brief, pp. 32-34).

However, since the second sentence of Section 9 (a) on its face infringes rights of expression and is designed to do so, the presence of these unconstitutional restraints invalidates the entire prohibition of the section. For the purpose of the prohibition is unitary, as its history demonstrates (Appellants' main brief, pp. 34-35). A piecemeal and patchwork re-interpretation of the scope of the prohibition would enhance the injury inflicted by the statute. It would also involve a substitution of the judgment of this Court for that of Congress as to what the scope of a new prohibition should be, in the light of any determination of this Court of the invalidity of the present one. The observation of the Court in *Hague* v. *C.I.O.*, 307 U. S. 496, 518 is wholly applicable here. The Court there said:

> As the ordinance is void the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners . . . The courts cannot rewrite the ordinance, as the decree in effect does.

The Civil Service Commission presently threatens to enforce the clear prohibitions of the section against appellants and all other employees in the classified civil service. It is well settled that under these circumstances a controversy ripe

for determination by equity and declaratory judgment proceedings exists. *Railway Mail Association* v. *Corsi*, No. 691, October Term, 1944, and cases cited at p. 4 of the slip opinion; *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Terrace* v. *Thompson*, 263 U. S. 197.

3. No Requirement of Exhaustion of Administrative Remedies Is Applicable in the Present Case.

The general purpose of the doctrine of exhaustion of administrative remedies is to foreclose resort to the courts until administrative action has been complete and whatever injury the administrative determination may entail is in fact inflicted. If resort to the courts for the review of every preliminary administrative determination were permitted, the courts would be clogged with incessant clamor for review of orders setting matters down for hearing (*U. S.* v. *Illinois Central R. R. Co.*, 244 U. S. 82; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375), and other types of determination which do not themselves inflict injury but are simply preludes to other administrative determination which may or may not ultimately injure the party who seeks his premature relief. See *Rochester Telephone Co.* v. *U. S.*, 307 U. S. 125, 130.

In general, such preliminary determinations as setting down a matter for hearing, rulings on evidence, *et cetera*, are incidents of administrative hearings entailing determination of controverted issues of fact. Thus it may be the case that the administrative tribunal, after hearing all the evidence, may determine that the matter is not within its jurisdiction or that the facts demonstrate that there is no violation of the statute or regulation. Thus even if preliminary determinations are adverse to the party, the ultimate administrative determination may be favorable to him and relieve him from fear of any injury. And in such situations he is generally free of any criminal or other liability until the administrative order is issued and in some cases he does not even risk such injury until the administrative order is judicially enforced in appropriate statutory proceedings (e.g. N.L.R.A. 29 U.S.C. section

151 *et seq.)*. It is in this type of situation that the doctrine of exhaustion of administrative remedies has its roots and in which it is an inexorable prerequisite to seeking judicial relief. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41.

However, where a statute or administrative regulation itself has the effect of deterring lawful conduct by threatening a penal or administrative sanction for engaging in it, and where no adequate administrative process exists which may delay or avert the penalty threatened, the requirement of exhaustion of administrative proceedings is inapplicable. See *Columbia Broadcasting System* v. *U. S.*, 316 U. S. 407; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Waite* v. *Macy*, 246 U. S. 606.

When, therefore, the substantive provisions of the statute or regulation are themselves invalid and the administrative agency has no authority in administrative proceedings to avert the impact of the statute where a set of facts is within its terms, resort to the administrative body is unnecessary as a condition precedent to seeking judicial relief. In the case of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, the company sought to enjoin the holding of hearings by the National Labor Relations Board on the ground that the company was not subject to the jurisdiction of that act since it was not engaged in interstate commerce. The court in holding that the administrative proceedings could not be enjoined, pointed out that among the facts to be determined in the hearing was whether the company was engaged in interstate commerce and the resolution of this issue would depend on the facts shown by the record compiled in the proceedings. Mr. Justice Brandeis in his opinion stated:

> "There is no claim by the corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied. The claim is that the provisions of the Act are not applicable to the Corporation's business at the Fore River Plant . . ." (303 U. S. 41 at 47.)

There exists no possibility of an exercise of administrative discretion in the interpretation of the statute and its application to the acts which appellants desire to engage in. For

the terms of the statute are clear, as is their application to these acts, and the infliction of the penalty is certain. Under these circumstances, the completion of an administrative proceeding before the Commission is certain not to prevent or diminish the present injury inflicted by the existence of the statute and its deterrence of conduct enjoying express constitutional protection. Where the outcome is so certain, and the infirmity so plain on the face of the statute, a futile exhaustion of administrative remedies is not required.

D. Suit for a Money Judgment in the Court of Claims Does Not Afford an Adequate Remedy to Appellants

The Government suggests that the appropriate remedy available to appellants for a determination of their rights is suit in the Court of Claims for salary after dismissal for actual commission of prohibited acts, and cites *Lovett, et al.*, v. *United States*, Ct. Cls., cases Nos. 46026, 46027 and 46028, decided November 5, 1945. But these very cases demonstrate the utter inadequacy of suit for a money judgment in the Court of Claims to protect civil rights of federal employees against invasion by unconstitutional enactments. Although a majority of the Court of Claims held the statute unconstitutional, it could afford no more relief than a money judgment, payment of which is contingent on further Congressional appropriation. Meanwhile, the claimants have suffered every substantial injury the enactment was designed to inflict. In the present case, appellants do not seek a money judgment; they are being paid regularly through the ordinary and less cumbersome processes of payroll disbursements. They desire to continue in their employ and to exercise their constitutional rights of expression free of invalid restraints and the penalties inflicted for their violation. As the *Lovett* case, *supra*, demonstrates, the Court of Claims cannot provide a remedy to afford any protection to these rights presently invaded.

Suit in the Court of Claims is an adequate remedy only where a money judgment is sought and the measure of recovery is clearly defined, as for instance by a specified term of office. See *Humphrey* v. *U. S.*, 295 U. S. 602. It may also be an adequate remedy where an employee seeks to recover the difference between the amount of salary actually paid

and that prescribed by statute. See *U. S.* v. *Langston*, 118 U. S. 389 (1886); *Collins* v. *U. S.* 15 Ct. Cls. 22 (1879). Similarly, resort to the Court of Claims may afford adequate relief where plaintiff has worked or otherwise been unlawfully deprived of compensation for a well-defined period and he seeks in a Court of Claims action to recover the amount of such compensation. See *U. S.* v. *Wickersham*, 201 U. S. 390.

However, where a member of the classified civil service enjoying an indefinite tenure on good behavior is discharged even unlawfully, and is paid up to the date of discharge, there exists no measure of damage. This factor among others has induced the courts to hold that upon discharge the right of an officer to salary ceases even where the officer has been wrongfully discharged. *Keim* v. *U. S.*, 177 U. S. 290; *Eberlein* v. *U. S.*, 257 U. S. 82; *O'Neil* v. *U. S.*, 56 Ct. Claims 89 (1921).

In the *O'Neil* case it was held that an officer upon removal ceases to be in the service of the United States. The court further stated: "His only remedy is to proceed without delay in a court with competent jurisdiction to try his right to the office" (p. 95).

Even if there were not these serious doubts as to existence of a claim for salary where the employee enjoying an indefinite tenure is discharged and paid up to date of discharge, it is evident that a suit for salary in the Court of Claims, litigated while the claimant is divested of his employment is no adequate remedy for the protection of basic constitutional rights.

II. THIS COURT HAS JURISDICTION OF THE PRESENT APPEAL.

The order for judgment of the District Court was filed on September 26, 1944 (R. 126-127). The petition for appeal, dated October 25, 1944, was allowed on October 26, 1944, and the order allowing the appeal was filed on that day (R. 130).[1]

[1] The Government's references to so-called orders not appearing in the record prior to the order of October 26, 1944, are misleading. Prior to the decision of this Court in *Commissioner* v. *Bedford*, October Term, 1944, No. 710, decided May 21, 1945, confusion existed as to whether or not the opinion of a court constituted the "judgment" which set the time for appeal running. In taking their appeal from the formal order of judgment of the statutory court, counsel for appellants have followed the course which was later approved in the *Bedford* case. See also *People's Bank* v. *Federal Reserve Bank of San Francisco*, 149 F. (2d) 850 (C.C.A. 9).

Successive orders of the court below extended the time for docketing the record in this Court to January 15, 1945 (R. 133).[5]

As the brief of appellees in opposition to the Government's suggestion that the appeal be dismissed shows, it is well established that failure to docket a case in time is not fatal to the jurisdiction of this Court on the appeal if the record is docketed prior to appellee's docketing the case and moving to dismiss.[6]

The Act of August 24, 1937, 28 U. S. C. section 380 (a) is clearly designed to afford the Government notice of proceedings in which the validity of an act of Congress is called into

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[5] The Government (Br. p. 2) refers to an order of Justice Letts bearing a date, October 25, 1944. But it does not state that the order referred to was filed on November 17, 1944 as appears from the record (R. 130), and not at a date prior to the allowance of the appeal on October 26, 1944 (R. 130).

[6] The Government (Govt. br. p. 4, note 2) adverts to matters outside the record relating to circumstances under which counsel for appellants docketed the record, and suggests a want of good faith in counsel for appellants' action in docketing the record. But this incomplete statement does not reveal all the facts, which dispel any such suggestion. For prior to January 15, 1944, within the time specified by the order of Judge Groner (R. 133), a counsel for appellants presented the record for docketing in the office of the Clerk of this Court. An employee of the office for some reason, perhaps failure to note the order of Judge Groner (R. 133), expressed an opinion that the record could not be docketed. Instead of docketing in any event, as he could have, even if late, the counsel deferred docketing the record and conferred with a counsel for the Government who also suggested that lateness in docketing was fatal to the appeal.

Thereafter another counsel for the appellants participated in the conference of January 31, 1945. Mr. Fahy, the then Solicitor-General, who is at present out of the country, was among those who attended. He had been advised, and assumed, as did counsel for appellants that lateness in docketing was fatal to the appeal. The discussion proceeded on this assumption, and no undertaking was made by appellants' counsel that he would forbear from docketing the record. Indeed, Mr. Fahy expressed regret that so important an appeal should fail for a technical defect. And the suggestions that the Government should docket and dismiss, or in the alternative, the appellants' counsel should stipulate a dismissal, were simply directed to facilitate the disposition of what was supposed to be an appeal which had already failed. When counsel for appellants learned on re-examination of the authorities that lateness in docketing did not oust this Court of jurisdiction, he retraced his steps and docketed the record. This comedy of errors, enacted outside the record, should certainly play no part in the disposition of the issue of law presented. Although appellants may have faltered and fumbled on their way to this Court, the appeal has not failed and fallen by the wayside.

question. It also provides the safeguard of a three-judge court and a direct appeal to this Court where an injunction against the enforcement of a statute is granted or denied, as does Section 380 of Title 28, U. S. C. The major purpose of this safeguard is to prevent improvident granting of injunctions interfering with the enforcement of statutes. Except for the stay of further proceedings against appellant Poole, pending disposition of this appeal (Appellants' main brief, p. 8, note 1), no injunction against the enforcement of the second sentence of Section 9 (a) has been issued. The Civil Service Commission is free to enforce the prohibition pending the appeal. Therefore, the delay in docketing the appeal works no injury which Section 380 (a) of Title 28 U. S. C. was designed to avoid.

III. THE GOVERNMENT HAS FAILED TO ESTABLISH THAT THE PROHIBITION OF THE SECOND SENTENCE OF SECTION 9 (a) DOES NOT INFRINGE RIGHTS OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The Government urges (Br. pp. 39, 49) that the importance of the subject matter of Government employment necessitates application of the usual presumption of validity to the prohibition of the second sentence of Section 9 (a). But, as pointed out in our main brief (pp. 12-20) the importance of free expression and the vital place it occupies in our scheme of government necessitates the opposite view. For it is the rights of free expression which are given explicit protection by the Constitution, and not the power of the Government to impose any condition whatsoever in regulating the conditions of employment of federal workers.

The Government also urges the difficulty of drawing a line as a justification for the sweeping coverage of the statute as to the Act's prohibitions and the persons forbidden to engage in them (Govt. br. pp. 24, 40, 43). Obviously some line can be drawn which does fall short of an almost total extinction of rights of expression of almost all federal employees. Where some line can be drawn the difficulty of doing a careful job does not excuse the effort and justify a sweeping prohibition.

encompassing both what may be validly prohibited and what may not. As this Court pointed out in the case of *10 East 40th Street Building* v. *Callus*, No. 820 October Term 1944 (p. 5 of Slip Opinion):

> "We cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controling weight. Lines are not the worse for being narrow if they are drawn on rational considerations."

The consideration to which Congress must give deference in drawing a line is preservation of the rights given explicit constitutional protection. Therefore, resolution of doubt must be in favor of protection of these rights of expression, and not their curtailment.

As demonstrated in our main Brief (pp. 41-45), the history of limitation on political activity of Government employees does not have "a geneology of substance extending back to the very beginnings of the nation." That history is rather a patchwork of varying policies operating in quite different contexts. If there is any "geneology of substance" in this field it is the history of legislative effort to preserve rights of expression of federal employees against curtailment by exercise of arbitrary powers of dismissal. (Appellants' main br. pp. 24-27.)

Respectfully submitted,

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 20

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.)

et al., Appellants

vs.

HARRY B. MITCHELL, LUCILLE FOSTER McMILLIN AND ARTHUR S. FLEMMING, *Appellees*

On Appeal From the District Court of the United States for the District of Columbia

SUPPLEMENTAL BRIEF FOR APPELLANTS

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SUPPLEMENTAL BRIEF FOR APPELLANTS

Questions raised by the Court in oral argument and some statements made in the supplementary brief for the Government require brief additional treatment.

1. *The meaning of the Act.* (a) The Court in oral argument expressed some interest whether the Congress in adopting Section 15 of the Act had before it the particular rules of the Civil Service Commission which it was incorporating by reference into the second sentence of Section 9(a). That it

did is clearly shown by the fact that the rules were included in the Congressional Record during the course of the Senate Debate (86 Cong. 2938-40. See also 86 Cong. Rec. 2943).

(b) The Government in Point 3 of its supplementary brief discusses whether the third sentence of Section 9(a) giving Federal employees the right to express their opinions on all political subjects and candidates overrides certain of the rules of the Commission insofar as they may be inconsistent. This discussion involves fringe matters having no relation to the issue before this Court. It is of no concern to this litigation that Federal employees may now engage in campaigns concerning the regulation or suppression of liquor traffic, and that the regulations concerning betting or wagering upon the results of primary or general elections which were included in the regulations may not have statutory force by virtue of the second sentence of Section 9(a).[1]

However, it is clear beyond question that Section 15 incorporates into Section 9(a) the specific prohibitions which are attacked by your appellants. Thus, it is clear, and the Government has not contended otherwise in oral argument or in its supplemental brief, that under Section 15 Federal workers may not "publish or be connected editorially or managerially with any political newspaper and may not write for publication or publish any letter or article, signed or unsigned, in

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[1] The Government also mentions Section 18 of the Act which provides an exemption from the Act for local elections and questions not identified with a national or state political party. This section, however, casts no light on the question before the Court, for it is an exception which does not deal with the issue of the rights of federal employees to engage in political activity in elections where national and state candidates and national and state issues are involved. And that is the sole issue before this Court.

The attempt of the Government to suggest that the Civil Service Commission has rule-making power which is of relevance in the present connection flies in the face not only of the express language of the statute but of the legislative history of the Act. For an earlier draft of the bill, S. 3046, 76th Cong., 3rd Sess., proposed to give the Civil Service Commission power to make and amend rules defining political activity. See S. Rep. 1236, 76th Cong., 3rd Sess. However, substantial objection was raised to giving the Commission discretion. See, *e. g.*, 86 Cong. Rec. 2352, 2426, and the resulting bill eliminated all discretion in the Commission on this subject.

favor of or against any political party, candidate, faction or measure" (R, 84). They may not address a meeting, convention or caucus or make motions or assist in preparing resolutions (R. 81, 82). If they become members of a political organization, they may not attempt to influence other members by actions or utterances (R. 81). They may not initiate or circulate petitions or canvass for the signatures of others (R. 85). They may not march in a political parade or organize or be an officer or a leader of such parade (R. 84).

In other words, the Act clearly and unequivocally incorporates a direct prohibition of every one of the fundamental exercises of the rights of freedom of speech and of the press which the appellants in this case desire to engage in. Indeed, the President of the Civil Service Commission on September 17, 1946, had no difficulty in explaining the precise scope of the rules incorporated by Section 15. On that date in a speech in St. Paul, Minnesota, before the Convention of the American Federation of Government Employees, he stated:

> "Since the passage of the Civil Service Act of 1883, and in accordance with a rule promulgated by the President under its provisions, the Civil Service Commission has had the duty of checking on and punishing political activity on the part of Federal employees in the executive service. In accordance with that duty, the Commission has published, on (sic) national election years, a list of political activities which were forbidden and which subjected the violators to a penalty—the extent of the penalty, as before stated, being left to the Commission prior to the Hatch Act. On the date that the Act "froze" determinations of what constituted violations, and eliminated Commission discretion as to penalties, there was listed:
>
> "Serving on or for any political committee, party, or other similar organization.
>
> "Serving as officer of a political club, as member or officer of any of its committees, addressing such a club or being active in organizing it.
>
> "Serving in connection with preparation for, organizing, or conducting a political meeting or rally, addressing such a meeting, or taking any other active part therein except as a spectator.

"Canvassing a district or soliciting political support for any party, faction, or candidate.

"Manifesting offensive activity at the polls, at primary or regular elections, soliciting votes, assisting voters to mark ballots, or helping to get out the voters on registration or election days.

"Acting as recorder, checker, watcher, or challenger of any party or faction.

"Assisting in counting the vote, or engaging in any other activity at the polls except marking and depositing the employee's own ballot.

"Serving in any position of election officer.

"Publishing or being connected editorially or managerially with any political newspaper or writing for publication or publishing any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure.

"Becoming a candidate for nomination or election to office, Federal, State, or local, which is to be filled in an election in which party candidates are involved.

"Distributing campaign literature or material.

"Circulating political petitions, including nominating petitions; but the signing of such petitions is not considered a violation."

And this accords with the specific exposition of the "WARNING" notice circulated by the Commission throughout the Government (See R. 114A).

The prohibitions are being constantly enforced. Thus it was only on the 22nd of July of this year that the Civil Service Commission entered an order imposing disciplinary action upon a Federal employee for delivering a speech over the radio during the course of a political campaign.[2] The speech was under the auspices of a Democratic State Committee. For this act and this act alone it was held that the employee had violated Section 9(a) of the Hatch Act. *In the matter of J. Ernest Kerr*, Civil Service Commission Federal Docket No. 1161, July 22, 1946.[3] Mr. Mitchell's speech *supra* cited

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[2] The speech was one prepared by a friend and when the friend was called away, the employee explained that fact and that he was delivering the speech in his friend's place. He then read what his friend would have said had he been there.

[3] Copies of the opinion have been filed with the Clerk.

instances of dismissal of employees for such activity as circulation of soldier ballot cards containing a political advertisement, obtaining a few signatures on a nominating petition for a candidate for justice of the peace, and solicitation of registration of voters (see pp. 6 and 7 of speech, copies of which are being filed with the court). It is precisely this type of activity in which appellants wish to engage and for which there is no question that the Act would require their dismissal.

* * * *

The speech cited above also contains an interesting insight into the practical operation of the ban on political activity. The head of the agency administering that prohibition stated:

> "Allow me, also, to call your attention particularly to the fact that it is the lower salaried employees who are made to suffer on account of the present law. Men of state importance have been caught violating the law and removal from state office has resulted; but, apparently the big fellows in the Federal service are more careful, or better informed, than the ordinary Federal employee. A few postmasters have been removed, but even these have been from smaller offices. The law excepts from its provisions heads and assistant heads of executive departments; officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relation with foreign powers or in the nation-wide administration of Federal laws. Federal employees, such as regional or state directors, customs or internal revenue collectors, and other like office holders, are subject to the penalties of the law, but there have been few, if any, complaints which have come to the Commission about persons of that rank. If there had been a basis for complaint, it is not at all likely that such office holders would have escaped."

2. *Separability.* The question was raised during the course of the argument whether this Court was under an obligation to consider every provision of the Civil Service Rules incorporated into Section 9(a) by Section 15 and to go down those

provisions one by one declaring which were constitutional and which were not. The Hatch Act contains a separability clause in the usual form. (See Section 11 of the original Act.) By reason of the operation of this separability clause it is clear that Congress intended the rest of the Act to stand even though the second sentence of Section 9(a) should be held unconstitutional. However, this does not mean that Section 15 incorporating a whole set of rules of the Civil Service Commission dealing with political activity is a Congressional declaration that each of the various rules is to stand though others may fall. Indeed, it is clear that Congress adopted the rules as a unit and intended that they should stand or fall as a unit. If, as we have urged, a substantial part of that code is an invalid infringement of the rights of freedom of speech and of the press, we believe that the Court may not rewrite the regulation, approving the valid provisions and excising the invalid. For this would trespass on the legislative province. Rather, the function of this Court is to say that Section 15 incorporates a code of regulations into Section 9(a) which is invalid in substantial part because it disregards the constitutional rights of Federal employees. In that event the entire code must be stricken down and sent back to Congress for redrafting in the light of the principles laid down by this Court. Congress will have the judgment of this Court that Federal employees are not wards of the State but that their constitutional rights of freedom of speech and the press must be respected.

It will then be the province of the legislature, having in mind those constitutional rights, to pass such legislation if any as it may see fit to protect the legitimate purposes of a clean politics law, without at the same time suppressing the fundamental rights of Federal employees. Indeed, a piecemeal and patchwork reinterpretation of the scope of the prohibition would enhance the injury inflicted by the statute. It would also involve a substitution of the judgment of this Court for that of Congress as to what the scope of a new prohibition should be, in the light of any determination of this court of the invalidity of the present one. The observation of the

Court in *Hague* v. *C.I.O.*, 307 U. S. 496, 518, is wholly applicable here. The Court there said:

> "As the ordinance is void the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners . . . The courts cannot rewrite the ordinance, as the decree in effect does."

3. The Court in argument considered the question of whether Federal employment was a privilege upon which could be grafted conditions not otherwise valid. Aside from the doubtful validity of the premise as a matter of law (see our main brief pp. 50-53), the argument contains the seeds of a threat to the liberties of the entire population. The whole gamut has not been run on limiting the rights of those who receive Federal funds. Yet there is before the court now in a companion case, proof that the tendency toward such limitation exists and that it has been extended in a substantial manner, *cf. State of Oklahoma* v. *Civil Service Commission*, No. 84, this Term. For the Hatch Act's prohibitions against political activity extend not only to the three million Federal employees but to the many millions employed in highway, social security and other branches of State Governments partly supported by Federal funds. The extension of the prohibitions to employees of private persons engaged in supplying goods or services under contract with the Government, and from there to pensioners and recipients of social security is but a gradual and logical extension.

Constitutional questions require a long view. This Court recently had occasion to note the prescience of Mr. Justice Bradley in foreseeing the dislocations in Federal and State relationships with respect to taxing authority created by the majority opinion in *Collector* v. *Day*, 11 Wall. 113. See *State of New York* v. *United States*, ——— U. S. ———, 66 Sup. Ct. 310, 312. With equal foresight in his dissenting opinion in *Ex Parte Curtis*, 106 U. S. 371, 377, Mr. Justice Bradley anticipated the extinction of civil rights of Federal employees which would result from pressing efforts to curtail their political activity beyond the limits of freedom of expres-

sion enjoyed by all others. His words, even now being "vindicated by time and experience," are as follows:

> "The freedom of speech and of the press, and that of assembling together to consult upon and discuss matters of public interest, and to join in petitioning for a redress of grievances, are expressly secured by the Constitution. The spirit of this clause covers and embraces the right of every citizen to engage in such discussions, and to promote the views of himself and his associates freely, without being trammelled by inconvenient restrictions. Such restrictions, in my judgment, are imposed by the law in question. Every person accepting any, the most insignificant, employment under the government must withdraw himself from all societies and associations having for the object the promotion of political information or opinions. For if one officer may continue his connection, others may do the same, and thus it can hardly fail to happen that some of them will give and some receive funds mutually contributed for the purposes of the association. Congress might just as well, so far as the power is concerned, impose, as a condition of taking any employment under the government, entire silence on political subjects, and a prohibition of all conversation thereon between government employees. Nay, it might as well prohibit the discussion of religious questions, or the mutual contribution of funds for missionary or other religious purposes. In former times, when the slavery question was agitated, this would have been a very convenient law to repress all discussion of the subject on either side of Mason and Dixon's line. At the present time any efficient connection with an association in favor of a prohibitory liquor law, or of a protective tariff, or of greenback currency, or even for the repression of political assessments, would render any government official obnoxious to the penalties of the law under consideration. For all these questions have become political in their character, and any contributions in aid of the cause would be contributions for political purposes. The whole thing seems to me absurd. Neither men's mouths nor their purses can be constitutionally tied up in that way. The truth is, that public opinion is oftentimes like a pendulum, swinging backward and forward to extreme lengths. We are not unfrequently in danger of becoming purists, instead of wise reformers, in particular directions, and hastily pass inconsiderate laws which overreach the mark they are

aimed at, or conflict with rights and privileges that a sober mind would regard as indisputable. It seems to me that the present law, taken in all its breadth, is one of this kind."[4]

Respectfully submitted,

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October 1946

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[4] Other observations in the same dissenting opinion are worthy of note in connection with the issues presented by the instant litigation. Thus at one point Justice Bradley stated:

"The offices of the government do not belong to the legislative department to dispose of on any conditions it may choose to impose. The legislature creates most of the offices, it is true, and provides compensation for the discharge of their duties; but that is its duty to do, in order to establish a complete organization of the functions of government. When established, the offices are, or ought to be, open to all. They belong to the United States, and not to Congress, and every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights."

And at another part he urged forcefully the position taken here by your appellants:

"The legislature may, undoubtedly, pass laws excluding from particular offices those who are engaged in pursuits incompatible with the faithful discharge of the duties of such offices. That is quite another thing. The legislature may make laws ever so stringent to prevent the corrupt use of money in elections, or in political matters generally, or to prevent what are called political assessments on government employees, or any other exercise of undue influence over them by government officials and others. That would be all right. That would clearly be within the province of legislation. It is urged that the law in question is intended, so far as it goes, to effect this very thing. Probably it is. But the end does not always sanctify the means. What I contend is that in adopting this particular mode of restraining an acknowledged evil, Congress has overstepped its legitimate powers, and interfered with the substantial rights of the citizen. It is not lawful to do evil that good may come. There are plenty of ways in which wrong may be suppressed without resorting to wrongful measures to do it. No doubt it would often greatly tend to prevent the spread of a contagious and deadly epidemic, if those first taken should be immediately sacrificed to the public good. But such a mode of preventing the evil would hardly be regarded as legitimate in a Christian country."

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In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL.

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF APPELLEES SUGGESTING WANT OF JURISDICTION OR DELAY REQUIRING DISMISSAL

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 911

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL.

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

MEMORANDUM OF APPELLEES SUGGESTING WANT OF JURISDICTION OR DELAY REQUIRING DISMISSAL

Comes now the Solicitor General on behalf of Harry B. Mitchell, Lucille Foster McMillin and Arthur S. Flemming, appellees in the above-entitled cause, and suggests to the Court that it may be without jurisdiction to entertain the appeal or that dismissal of the appeal may be appropriate because of delay in docketing.

STATEMENT

1. This action was commenced in the District Court of the United States for the District of

Columbia by the United Federal Workers of America (C. I. O.), et al., appellants, against Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, appellees, to enjoin the appellees from enforcing the provision of Section 9 (a) of the Act of August 2, 1939, 18 U. S. C. § 61h (a), which forbids officers and employees in the executive branch of the Federal Government to take any active part in political management or political campaigns.

2. A three-judge court, consisting of D. Lawrence Groner, Chief Justice of the United States Court of Appeals of the District of Columbia, and Jennings Bailey and James W. Morris, Associate Justices of the District Court, was duly convened on May 8, 1944, pursuant to § 3 of the Act of August 24, 1937, 28 U. S. C. § 380a; and on September 26, 1944, it entered its judgment, dismissing the complaint and granting summary judgment to the appellees.

3. On October 26, 1944, an order allowing appeal from the judgment of September 26, 1944, was entered by Chief Justice Groner, the presiding judge of the three-judge court. On December 16, 1944, Chief Justice Groner signed a citation, returnable within 40 days from its date, and, on December 21, 1944, an order extending the time for docketing the record in this appeal to and including January 15, 1945.

4. No other orders were entered further extending the time within which to docket the case.

5. On February 2, 1945, the appellants filed the record and docketed the case in this Court.

APPLICABLE STATUTE AND RULES

This action was commenced under and the appeal taken pursuant to § 3 of the Act of August 24, 1937, 28 U. S. C. § 380a, which provides:

> * * * An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment * * *. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. * * *

Rule 72 of the Federal Rules of Civil Procedure provides that in such an appeal the record shall be "made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 47 of this Court, governing appeals to this Court under the Act of August 24, 1937, provides that such appeals "shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States * * *. The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."

THE PROBLEM PRESENTED

The statute, *supra*, provides in succeeding sentences that an appeal may be taken within 30 days after the entry of the order, decree or judgment and that the appeal shall be docketed within sixty days from the time the appeal is allowed, without any provision for the extension of either period. It appears from the face of the Act that its purpose is to assure notice to the United States of proceedings in which the constitutionality of an act of Congress is called in question and to provide expeditious procedure for disposing of such cases. See S. Rep. 963, at p. 3, and H. Rep. 1490, at p. 6, 75th Cong., 1st sess. In view of well-understood law with regard to the filing of petitions for certiorari and applications for appeal, it can scarcely be doubted that observance of the thirty-day time limit upon taking the appeal is jurisdictional under the present statute. It would not be unreasonable to conclude, therefore, that, pursuant to the statutory purpose to secure expedition, compliance with the provision for prompt docketing of appeals was also intended to be a condition of this Court's power to entertain the appellate proceedings; but, in the light of past practice, this is perhaps not a necessary conclusion.

The practice in docketing other appeals is governed by Rule 11 of this Court, which provides for the discretionary allowance of extensions of

time. Under the ordinary procedure the failure of an appellant to docket his appeal by the return day, whether as originally specified or as extended, does not deprive this Court of jurisdiction to entertain the appeal in case it is subsequently docketed. The appeal is, however, subject to a motion to docket and dismiss at any time after the return date and before actual docketing. See Robertson, *Practice and Procedure in the Supreme Court of the United States* (Revised Edition, 1929), pp. 152–155; 10 *Cyclopedia of Federal Procedure* (2d ed., 1943) 681–682. It was a recognized rule, at least until the shortening of the time for applying for appeals by Section 6 of the Act of September 6, 1916,[1] that, whether or not the procedural defect was jurisdictional, the Court would not entertain an appeal which was docketed after the term of Court next succeeding the allowance of the appeal. *Hill* v. *Chicago & Evanston R. Co.*, 129 U. S. 170, 174; *Grigsby* v. *Purcell*, 99 U. S. 505; 10 *Cyclopedia of Federal Procedure, supra*, 684, n. 91. There is no evidence in the legislative history of the Act of 1937, here involved, as to whether or not the past appellate practice was in the minds of the framers of the Act. The question of statutory interpretation may perhaps be stated as whether the provision of the Act that the docketing shall be "under such rules as may be prescribed by

[1] 39 Stat. 726, 727.

the proper courts" was intended to qualify the apparently rigid time limit upon the docketing which the statute contains. The applicable Rule of this Court (Rule 47) does not provide for extending the time for docketing as does Rule 11.

CONCLUSION

The appellees do not represent that the public interest requires in this case that the appeal be dismissed because of failure to docket the appeal within the statutory period. On the other hand they are not advised that any mitigating circumstances excuse the failure of compliance with the statutory requirement. Cf. *R. F. C.* v. *Prudence Group,* 311 U. S. 579. It is important to the parties that the rather elaborate argument which will be required if the merits are to be presented to the Court be not undertaken unless the issue which is involved can actually be determined in this case. For these reasons, the Court is respectfully requested to rule upon the question of its jurisdiction and upon the right of the appellants to prosecute their appeal in the face of noncompliance with the statute.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1945.

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No. 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.), ET AL.,

Appellants,

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 34

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.), ET AL.,

Appellants,

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

Opinion Below

The opinion of the District Court of the United States for the District of Columbia (R. 116-126) is reported at 56 F. Supp. 621.

Jurisdiction

A. PROCEEDINGS BELOW

This action was commenced in the District Court by the appellants (1) to enjoin the appellees from enforcing the

provision of Section 9(a) of the Act of August 2, 1939, 18 U. S. C. 61h (a), which forbids officers and employees in the executive branch of the Federal Government to take an active part in political management or political campaigns, and (2) for a declaratory judgment that this provision is unconstitutional (R. 1-9). A three-judge court[1] was duly convened pursuant to Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a (R. 9-10). In an opinion filed on August 4, 1944 (R. 116-126) the three-judge court held the challenged provision valid, and on September 26, 1944, the court entered its judgment in accordance with that opinion, dismissing the complaint and granting summary judgment to the appellees (R. 126-127).

B. APPEAL PROCEEDINGS

On September 2, 1944, before the judgment below was rendered, appellants petitioned for appeal from the "order" of August 4, 1944, and an order allowing this appeal was entered by F. Dickinson Letts, Associate Justice of the District Court. Thereafter, on October 25 and November 20, 1944, Justice Letts entered orders extending the time within which the appeal could be perfected to and including November 25 and December 25, 1944, respectively (R. 130-131).

On October 26, 1944, appellants petitioned for appeal from the judgment of September 26, 1944 (R. 127-128) and an order allowing this appeal was entered by Chief Justice Groner (R. 130). On December 16, 1944, Chief Justice Groner signed a citation, returnable within 40 days from its date, and, on December 21, 1944, an order extending the

[1] Consisting of D. Lawrence Groner, Chief Justice of the United States Court of Appeals for the District of Columbia, and Jennings Bailey and James W. Morris, Associate Justices of the United States District Court for the District of Columbia.

time for docketing the record in this appeal to and including January 15, 1945 (R. 133).

No other orders were entered further extending the time within which to docket the case. On February 2, 1945, the appellants filed the record and docketed the case in this Court.

C. JURISDICTION OF THIS COURT

The jurisdiction of this Court is asserted under Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a, which provides:

> • • • An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment • • •. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. • • •

The record in this case was not "made up and the case docketed" in this Court within the time specified by the statute. In view of this fact, the appellees, on February 26, 1945, filed with this Court a memorandum suggesting want of jurisdiction or delay requiring dismissal and, on March 9, 1945, the appellants filed an answer thereto. On March 12, 1945, the Court entered its order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 135).

It is respectfully submitted that, for the reasons asserted in the memorandum filed with this Court by appellees on February 26, 1945, suggesting want of jurisdiction or delay requiring dismissal, the untimely filing of the record and docketing of the case in this Court requires the dismissal of

the appeal for want of jurisdiction.[2] Since that memorandum dealt fully with the subject, further discussion will not be included in this brief.

Questions Presented

1. Whether this Court has jurisdiction of a case appealed under Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a, but not docketed within the time specified in that statute.[3]

2. Whether appellants, or any of them, have stated a claim which entitles them to relief against appellees.

3. Whether the provision of Section 9 (a) of the Act of August 2, 1939, 18 U. S. C. 61h(a), which forbids officers and employees "in the executive branch of the Federal Government" to take "active part in political management or in political campaigns", is constitutional.

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[2] In appellants' answer to appellees' memorandum, appellants contended that "failure to docket in time may be the occasion for the appellee having the cause docketed and the appeal dismissed" and that the appellees' failure to follow this procedure left them remediless (pp. 10-11). Appellants stated further: "We believe that if our reasons for delay were relevant, they would be found adequate. In any event, we would have been glad to advise the government of the details had it earlier expressed an interest in the matter" (p. 12). No such details were, however, advanced at a conference held on January 31, 1945, between counsel for appellants and counsel for appellees, held at the request of counsel for appellants. The subject of discussion was whether appellants' delay in docketing the case was fatal to the jurisdiction of this Court. The Solicitor General advised appellants' counsel that the appellees were prepared to docket the case and move to dismiss. Counsel for appellants stated that in his opinion appellants' failure to docket on time had resulted in a jurisdictional defect and that a preferable way of disposing of the matter might be for appellants themselves to move to dismiss the appeal and thereafter to institute a new suit. Counsel for appellees replied that they would withhold docketing the case and moving to dismiss the appeal, pending decision by appellants as to whether they themselves desired to move to dismiss. On February 2, 1945, without further notice, the appellants docketed the case in this Court.

[3] This question is treated under the preceding heading of *Jurisdiction*.

Statutes and Regulations Involved

The relevant provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 51-59.

Statement

On April 25, 1944, appellants filed a complaint (R. 1-9) in the District Court of the United States for the District of Columbia, seeking (1) to enjoin appellees, the members of the United States Civil Service Commission (R. 3), "from enforcing the provisions of the second sentence of Section 9 (a) of the Hatch Act" (Act of August 2, 1939, as amended, 18 U. S. C. 61h(a)) and (2) "a declaratory judgment that it is repugnant to the Constitution of the United States" (R. 9).

The material allegations of the complaint may be summarized as follows: Appellants are the United Federal Workers of America, an unincorporated labor union composed of employees of the United States Government (R. 2), and twelve individuals, each of whom occupies a classified civil service position in the Federal Government (R. 2-3). The Union is organized for "the improvement of working conditions" of Federal employees (R. 3) and "must engage in legislative activity" to achieve its objectives (R. 4). It "has an interest in protecting and restoring the rights of its membership" and brought this action "as a representative of, and on behalf of, all of its members, including those who have not specifically joined in suing individually, who are subject to the provisions of the second sentence of Section 9 (a) of the Hatch Act" (R. 4). The individual appellants

> • • • desire to engage in the following acts: write for publication letters and articles in support of candidates for office; be connected editorially with publications which are identified with the legislative

> program of UFWA and candidates who support it; solicit votes, aid in getting out voters, act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; participate in and help in organizing political parades; initiate petitions, and canvass for the signatures of others on such petitions; serve as party ward committeeman or other party official; and perform any and all acts not prohibited by any provision of law other than the second sentence of Section 9 (a) and Section 15 of the Hatch Act, which constitute taking an active part in political management and political campaigns. (R. 4.)

One of the individual appellants, George Poole, has performed many of such acts in the past and intends to continue to do so (R. 4).

The complaint, as amended (R. 115), charged that the appellees had threatened to cause the individual appellants to be dismissed from Federal employment if they engaged in the activities referred to above and "have already commenced proceedings" for Poole's dismissal from the Government (R. 7); that the second sentence of Section 9 (a) of the Hatch Act is repugnant to the First, Fifth, Ninth, and Tenth Amendments to the Constitution of the United States (R. 7-8); and that unless appellees are permanently enjoined from enforcing it appellants will be unable to engage in the activities specified above "except by incurring the penalty of removal from employment" (R. 8), for which no adequate remedy is available at law (R. 7).

Appellants also filed a motion for interlocutory injunction (R. 10-11), attached to which were the affidavits of the individual appellants (R. 11-29). The affiants stated that they are citizens of the United States and Federal employees in the classified civil service and that it was the "earnest desire" of each of the individual appellants

> to engage actively in political management and political campaigns . . . by all proper means such as

> engaging in discussion, by speeches to conventions, rallies and other assemblages by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by 'ringing doorbells', by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor. (R. 12, 15, 16, 18-29.)

These affidavits did not allege that 11 of the individual appellants had actually ever performed any of the described acts, but the affidavit of appellant Poole stated that

> • • • I have taken an active part in political campaigns and political management. In the 28th Ward, 7th Division in the City of Philadelphia I am and have been a Ward Executive Committeeman. In that position I have on many occasions taken an active part in political management and political campaigns. I have visited the residents of my Ward and solicited them to support my party and its candidates; I have acted as a watcher at the polls; I have contributed money to help pay its expenses; I have circulated campaign literature, placed banners and posters in public places, distributed leaflets, assisted in organizing political rallies and assemblies, and have done any and all acts which were asked of me in my capacity as a Ward Executive Committeeman. I have engaged in these activities both before and after my employment in the United States Mint. I intend to continue to engage in these activities on my own time as a private citizen, openly, freely, and without concealment. (R. 13.)

Poole's affidavit further stated that he had "been served with a proposed order of the United States Civil Service Commission" advising him that he had been found "'guilty of political activity in violation of Section I, Civil Service

Rule I' " and that unless he could refute such charges he would be dismissed from his position in the United States Mint at Philadelphia (R. 13-14).

Appellees then filed motions to dismiss the complaint and for summary judgment in their favor on the grounds that the complaint stated no claim or controversy against appellees upon which relief could be granted, that appellees were entitled to judgment as a matter of law, and that the court lacked jurisdiction to grant the relief requested (R. 29-30). In support of their motions, appellees filed affidavits by Lawson A. Moyer (R. 30-111), the Executive Director and Chief Examiner of the United States Civil Service Commission (R. 30), and of Kenneth C. Vipond (R. 111-113), the Acting Executive Director and Chief Examiner of the Commission (R. 111).

The affidavit of Mr. Moyer averred that "Except with respect to its own employees, the Civil Service Commission is not authorized to, and does not, enforce the provisions of Section 9 (a) of the Hatch Act. The Civil Service Commission does enforce the provisions of Civil Service Rule I by the method set forth in Rule XV of the Rules of the Civil Service Commission as to Federal employees in the competitive classified service" (R. 30).[4] Mr. Moyer further stated that no proceedings of any kind have been instituted by the Commission and no disciplinary action of any kind has been taken against any of the appellants except Poole (R. 31). As for Poole, the Commission and the Treasury Department had jointly conducted an investigation of "alleged political activities" on his part, and as a result a Proposed Order was issued by the Commission on January 12, 1944 (R. 31, 33-35), charging that he took an active part in political management and campaigns "in contravention of Section 1, Civil Service Rule I, and the regula-

[4] See fn. 5, *infra*.

tions adopted by the Commissioners thereunder", by (1) holding the office of Democratic Ward Executive Committeeman in Philadelphia, Pennsylvania; (2) acting as a Democratic Party worker at the polls on general election day, November 5, 1940; and (3) assisting in the "distribution of funds in paying party workers" for services on that day (R. 33-35). The Proposed Order, setting forth the charges (R. 33), the substantiating evidence (R. 33-34), and the preliminary finding of the Commission (R. 35), and further setting forth Poole's right to answer and to present any evidence in refutation of the charges (R. 35), had been sent to Poole by registered mail (R. 31-32). Counsel for Poole had sought and obtained from the Commission an indefinite extension of time within which to answer the Proposed Order; but neither an answer nor a request for a hearing had been filed and no final order had been issued with respect to Poole (R. 32).

The affidavit of Mr. Vipond reiterated that the "Commission does not have the statutory authority to enforce, and does not enforce, Section 9 (a) of the Hatch Act with respect to any Federal employees except those who are" employed by it (R. 111-112); and that Commission Form 1982 (annexed to the amended complaint as Exhibit II, R. 114A-115) "is addressed to Federal employees for their advice and guidance" (R. 112).

The court below, a three-judge statutory court duly convened by the Chief Justice of the United States Court of Appeals for the District of Columbia pursuant to Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a (R. 9-10), after hearing, granted the appellees' motions, dismissing the complaint and granting summary judgment for appellees (R. 127). Ruling that the individual appellants "have such an interest as to give them the right to maintain this suit" (R. 120) and that the suit was properly brought against the

appellees (R. 123), the court upheld the constitutionality of the second sentence of Section 9 (a) of the Hatch Act (R. 126).

Summary of Argument

Although, as we contend in this brief, the court below correctly decided that the second sentence of Section 9(a) of the Hatch Act, here challenged, is constitutional, we respectfully submit that the suit should have been dismissed for lack of jurisdiction.

Even without reference to possible technical deficiencies in appellants' complaint, and conceding *arguendo* that the interest of at least the appellant Poole was sufficiently threatened to warrant equitable intervention if the matter were of equitable cognizance, appellants have mistaken their remedy and their forum. The individual appellants assert their right to continue in their positions notwithstanding political participation on their part and seek an injunction to protect their tenure as against possible acts lying within the official province of appellees. They may not succeed; for "it is * * * well settled that a court of equity has no jurisdiction over the appointment and removal of public officers * * *." *White* v. *Berry*, 171 U. S. 366, 377.

Even the remedy of mandamus may not be used to interfere with the performance of the duties of executive officers of the Government in relation to personnel matters. This is precisely what appellants seek in this case to accomplish by injunction. Their remedy, we submit, is not to attempt thus to forestall the administrative process, but to exercise their legal rights and, if disciplinary action is taken, to sue for any compensation wrongfully withheld from them.

The same considerations which place it beyond the jurisdiction of the courts to grant preventive relief to appellants, cause the prayer for a declaratory judgment to fail; for "The declaratory * * * judgment procedure may be resorted to only in the sound discretion of hte Court * * *". *Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term, 1944, p. 8 of slip opinion.

The challenged provision of the Hatch Act is not a strange or novel development in the law governing the Federal civil service, but has a background extending back to the early years of the Republic. Political activity by Government officers and employees has been a cause of complaint from the beginning. In its efforts to deal with the problem thus recognized and with attendant evils, Congress has validly adopted the provision which is here under attack and has enacted related measures. These must be considered together in determining the question presented.

The provision was not lightly adopted and represents the considered judgment of the Congress. It is less drastic than the Civil Service Rule which preceded its enactment and is closely related to statutory prohibitions of political assessments against government employees and against partisan discrimination in promotion and discharge. The line between permissible and forbidden conduct has been a shifting one and cannot remain fixed; the problem is properly subject to legislative discretion.

In general, the provision in question has the following purposes: (1) to eliminate one basis for politically motivated removals and discrimination among employees; (2) to forestall the use of public employees and the abuse of official authority for partisan purposes; (3) to aid in providing an efficient administrative service; and (4) to establish confidence in the fairness of the public service.

Similar restrictions upon the political activity of public officers and employees are a characteristic feature of pres-

ent-day government in the English-speaking world. Five states of the union have enactments of similar scope which may stand or fall with the challenged provision. The tradition of abstention from partisan political activity which these enactments evidence grows out of the needs of modern government, and the effort to eliminate the grosser evils of discrimination and patronage. These considerations are of increasing importance and do not lead in the Hatch Act to the imposition of a condition of weak neutrality upon Federal officers and employees, who may publicly and privately express their personal views and may in their official relations state their convictions frankly. A single channel of political expression and activity is alone denied them so long as they remain in the Federal employ.

The restriction which Congress has thus imposed is not violative of either the First or the Fifth Amendment. The question is first of all one of the reasonableness of the provision in order to check a substantive evil which Congress has a right to prevent. To hold that the provision is violative of the First Amendment would be improperly to substitute the judicial judgment for that of Congress. Nor is it valid to contend that Congress has gone beyond its power by striking at the root of the problem with which this and related legislation deals, instead of confining itself to prohibiting specific pernicious practices. Congress may elect to deal with the sources of evils which are properly of concern to it, even to the extent of controlling activity which would otherwise be beyond its power to reach.

The distinctions among Government employees which the challenged provision establishes rest upon a sound foundation and do not constitute a ground of invalidity. The contention that the inclusion of mechanical, clerical, and custodial employees renders the prohibition invalid, breaks down upon analysis.

The legislation here in question is entitled to the presumption of constitutionality, which should not be lightly disregarded in a matter of such importance.

ARGUMENT

I

The Court Below Lacked Jurisdiction to Grant the Relief Requested

While the court below upheld the constitutionality of the second sentence of Section 9(a) of the Hatch Act, a holding which we believe was correct and which we support in this brief, we respectfully submit that the court should have dismissed the suit for lack of jurisdiction, without passing upon the constitutional question. This is true as to both the injunctive relief and the declaratory judgment which were sought.

A. NO EQUITABLE CAUSE OF ACTION IS STATED

Even without reference to possible technical deficiencies in appellants' complaint,[5] their suit relates to a subject

[5] Appellants' complaint seeks an injunction against the appellees as members of the United States Civil Service Commission, enjoining them "from enforcing the provisions of the second sentence of Section 9(a) of the Hatch Act." The Commission's proceedings against appellant Poole, however, were not commenced for violation of Section 9(a) of the Hatch Act, but for violation of Section 1 of Civil Service Rule I (R. 13, 33, 35) which provides in part that persons "in the competitive classified service, while retaining the right to vote as they please and to express their opinion on all political subjects, shall take no active part in political management or in political campaigns" (R. 39; 5 C. F. R., 1943 Cum. Supp., § 1.1). The Commission does not claim authority to enforce Section 9(a) of the Hatch Act as to any Federal employees other than members of its own organization (*supra*, pp. 8, 9). Appellants, therefore, are not threatened with any action by the appellees under that section.

With respect to classified employees, the proscription contained in Section 1 of Civil Service Rule I (*infra*, p. 58) is, however, almost identical with that contained in the second sentence of Section 9(a) of the Hatch Act. Civil Service Rule XV (*infra*, p. 59) provides that the Commission, upon finding "after due notice and opportunity for explanation

matter with respect to which the courts do not have jurisdiction to grant injunctive relief. Conceding *arguendo* that the immediacy of the threat by appellees to the interest of at least the individual appellant Poole as a government employee might be sufficient to warrant equitable intervention if the matter were of equitable cognizance,[6] appellants have mistaken their remedy and their forum.

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that any employee subject" to the Civil Service Act or Rules has violated any of them, "shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing" (5 C. F. R. 1943 Cum. Supp., § 15.1; see R. 30-35, 41-44). The statutory penalty of dismissal is now mandatory for violation of the pertinent provision of Rule I, as for violation of the statutory provision, R. 41; 40 Op. Atty. Gen. No. 2.

For these reasons it may be conceded that as to classified employees the Civil Service Commission does in practical effect enforce the challenged provision of § 9(a) as well as the corresponding provision of Civil Service Rule I, as the court below found (R. 122-123), or at least that it is immaterial which enactment is referred to in a complaint such as appellants'. Since the action of dismissing offending employees must in any event be taken by the heads of the employing departments (39 Op. Atty. Gen. at 447, 462), it may be questioned whether complete relief could be afforded to appellants in this proceeding if they should prevail; but the defect of parties, if there be one, is scarcely jurisdictional.

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[6] Appellant Poole, who admits having engaged in conduct which is proscribed by § 9(a) of the Hatch Act as elaborated in the determinations of the Civil Service Commission invoked by § 15, appears to be threatened by enforcement proceedings which can have but one outcome. Legal rights asserted by him are, therefore, "threatened with imminent invasion by appellees", as in *Railway Mail Association* v. *Corsi*, No. 691, October Term, 1944, and in the cases cited at p. 4 of the slip opinion. As to the other individual appellants it is at best doubtful whether the asserted definiteness of their "desire" to engage in specified political activities which would be in violation of the challenged provision (R. 4, 12, 15-16, 18-29) can be a substitute for actual threatened application of the broad provision of the statute to them (*Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term, 1944, p. 8 of slip opinion; *Watson* v. *Buck*, 313 U. S. 387, 402) as a foundation for seeking equitable relief. The appellant United Federal Workers, which makes no claim on its own behalf but joins in the action simply "as a representative of, and on behalf of, all of its members" (R. 4),

The individual appellants seek to enjoin interference with their right to retain their positions in the Federal Government while carrying on activities which are in violation of the restrictions imposed by the second sentence of Section 9(a) of the Hatch Act and by Civil Service Rule I, upon the ground that these restrictions are invalid. In other words, they assert the right to continue in their positions as against possible acts lying within the official province of appellees which might bring about appellants' removal.[7] This may not be done in an injunction proceeding, and it is doubtful at best whether any other type of preventive remedy is available for the same purpose.

In the words of this Court in the leading case of *White* v. *Berry*, 171 U. S. 366, 377, quoting from *In re Sawyer*, 124 U. S. 200, 212, "it is * * * well settled that a court of equity has no jurisdiction over the appointment and removal of public officers * * *." The Court therefore held that a district court is powerless to enjoin a dismissal of a Federal employee in the classified civil service in alleged violation of the Civil Service Act.[8]

Even the remedy of mandamus, which under some cir-

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can have no greater standing to sue than the individuals for whom it speaks. Those who are not parties to the action have not even expressed a "desire" to become active politically and still keep their jobs. The Union, we submit, has not stated a cause of action which it is entitled to bring to court—even if a union may sue as a representative of members who are aggrieved. Cf. *Hague* v. *C. I. O.*, 307 U. S. 496, 514, 527; *United States* v. *White*, 322 U. S. 694.

[7] They also, of course, assert the right to engage in certain political activities, but it is not alleged that appellees are threatening to interfere with this right except as they would do so indirectly by proceedings looking to the individual appellants' dismissal from their positions. These appellants' status as Federal employees is the *sine qua non* of the alleged cause of action.

[8] So unquestioned has been the rule thus established that subsequent Federal decisions in point appear to be lacking, but the rule has been often repeated. See, e. g., *Walton* v. *House of Representatives*, 265 U. S. 487, 490; *People* v. *Finnegan*, 378 Ill. 387, 394-401 (1941); *Welker* v. *Lathrop*, 210 N. Y. 434 (1914).

cumstances may be invoked to correct a procedurally improper dismissal of a Government employee, *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C.), or to enforce the clear statutory right of such an employee, *Farley* v. *United States*, 92 F. 2d 533 (App. D. C.), may not be used to interfere with the performance of the duties of executive officers of the Government in relation to personnel matters. *Levine* v. *Farley*, 107 F. 2d 186 (App. D. C.); *United States* v. *Mitchell*, 89 F. 2d 805 (App. D. C.). That, however, is precisely what appellants seek in this case to accomplish by injunction. Appellees have the duty of instituting proceedings in proper cases to determine whether employees in the classified civil service have engaged in illegal political activity and, if such activity is found to have occurred, to take steps to bring about the dismissal of those who have offended. This is a delicate function not lightly bestowed upon the appellees or lightly to be exercised, relating to the internal operations of the Government, the performance of which the courts should not undertake to prevent even on constitutional grounds. The remedy of the individual appellants, we submit, is not to attempt to forestall the administrative process by injunction but to exercise what they deem to be their legal rights (as nothing prevents their doing and as appellant Poole has done) and, if disciplinary action is taken leading to loss of their positions and of compensation due them, to sue for any sums wrongly withheld. See *United States* v. *Perkins*, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52; *Humphrey's Executor* v. *United States*, 295 U. S. 602; *Lovett et al.* v. *United States*, C. Cls. cases Nos. 46026, 46027, and 46028, decided November 5, 1945.

The unwisdom of interference by injunction at this stage of appellants' case is emphasized by their concession (Br. 13) that, were it not for the specificity given to the challenged provision of Section 9(a) of the Hatch Act by Section 15 (*infra*, pp. 53-54) which incorporates into Section

9(a) the relevant substance of the Civil Service Commission's interpretation of its Rules as they existed in 1940, the "extremely general language" of the provision "could readily have been so construed and applied as not to result in conflict with the First Amendment." If only specific aspects of the prohibition of Section 9(a) are alleged to offend against the Constitution, ground is lacking for the sweeping injunction which is sought. Appellants cannot rightly seek to paralyze the entire enforcement of a broad statutory provision in order to prevent specific applications which alone are alleged to be unconstitutional. *Alabama State Federation of Labor* v. *McAdory; Watson* v. *Buck*, both *supra*, n. 6.

B. NO CASE FOR A DECLARATORY JUDGMENT IS PRESENTED

The same considerations which, as we contend, place it beyond the jurisdiction of courts to grant preventive relief to the appellants, cause the prayer for a declaratory judgment to fail; for "The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered." *Alabama State Federation of Labor* v. *McAdory*, *supra*, p. 8 of slip opinion. If considerations bearing upon the proper relation of the judiciary to the administration of governmental personnel matters impose a self-denying ordinance upon the courts pending the performance of executive functions in relation to these matters (*supra*, pp. 15-17), the ordinance applies no less to declaratory judgment proceedings than to others in which it is sought to anticipate actual injury to the moving parties. In addition, this Court has emphasized the undesirability of permitting such proceedings to be made a medium for securing advisory opinions "in a controversy which has not arisen" (*Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324, and authorities

there cited), as would be the case here with respect to other appellants than Poole.

II

The Provision of the Hatch Act Questioned Herein Is Constitutional

The Hatch Act, approved on August 2, 1939, was intended to strengthen the public service and eliminate certain evils in the use of official personnel. Section 9(a) of the Act relates solely to conduct of officers and employees of the Federal Government. The first sentence of Section 9(a) prohibits the use of "official authority or influence for the purpose of interfering with an election or affecting the result thereof." The third sentence provides that employees "shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates." Appellants do not question the constitutionality of these provisions. They attack the validity of only the second sentence, which forbids Federal employees, with certain exceptions not here material, to take "active part in political management or in political campaigns." We shall show that this sentence, as well as the other two, is a proper exercise of the congressional power to establish a sound, impartial civil service based upon merit and divorced from "spoils," as well as freed from subtle pressures and influence to which political considerations in administration may give rise.

A. The provision of section 9(a) which is here attacked is a consistent development in federal legislation affecting the civil service.

The provision of the Hatch Act which is here under attack is not a strange or novel development in the law governing the Federal civil service. As the history of this

country makes abundantly clear, "From the beginning of our government there has been complaint of the activity of office-holders; and such complaint will probably never cease, as it is practically impossible to draw a working distinction between the proper interest of the citizen and the obligations of the servant of the government."[9] In its efforts to deal with the problem thus recognized and with attendant evils, Congress has adopted significant measures other than the present one and has sanctioned additional measures which have been placed in effect by executive order.

In a message accompanying his approval of the Hatch Act, which dealt specifically with the rights of Federal employees under the provision now questioned, President Roosevelt noted that "in applying to all employees of the Federal Government (with a few exceptions) the rules to which the civil-service employees have been subject for many years, this measure is in harmony with the policy that I have consistently advocated during all my public life, namely, the wider extension of civil service as opposed to its curtailment."[10] The consistency of the challenged provision with the development of the civil service in this country was thus recognized.

The provision, moreover, was not adopted lightly or without recognition of its background or of the constitutional issues that might be raised with regard to it. Orig-

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[9] Carl Russell Fish, *The Civil Service and the Patronage* (1904), p. 179. This study is the standard work which deals with the background of the Civil Service Act of 1883. Earlier pages contain much evidence that the political activity of prior office-holders, not less than the desire of political victors for spoils, played a large part in the removals of public servants from office which gave rise to such widespread criticism and, in the end, received legislative treatment. The Fifteenth Annual Report of the United States Civil Service Commission (1898) also reviews the history lying back of the Act, at pp. 443-485.

[10] S. Doc. 105, 76th Cong., 1st sess., p. 1.

inally enacted by the Senate in more drastic form,[11] the bill was revised in the House after thorough debate [12] which centered mainly upon the provision in question and related proposals which came before the two houses. The resulting product was accepted in the Senate after its Senatorial sponsor had characterized it as expressing "the philosophy of the Senate of the United States as contained in section 9." [13] In the House the relationship of the bill to the civil service laws and its application to various categories of Federal employees were thoroughly explored and understood. In 1940, when important additions to the Act were proposed and adopted at a later session of the same Congress, extensive debate occurred in the Senate [14] as well as the House.[15] In the Senate a proposal to repeal Section 9 was discussed and rejected.[16] Clearly, therefore, the provision in question represents the considered judgment of both houses with respect to the restraints which should be placed upon the political activity of government officers and employees, as the court below found (R. 124).

The concern of Presidents with protecting the integrity of the civil service as against the consequences of political activity by office-holders has been evidenced throughout our history. In 1801 the heads of the executive departments, at the direction of President Jefferson, issued an order, stating that

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments * * * it is deemed im-

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[11] The bill as passed by the Senate is printed at 84 Cong. Rec. 9596.
[12] 84 Cong. Rec. 9594-9640.
[13] 84 Cong. Rec. 9672.
[14] 86 Cong. Rec. 2338-2367, 2426-2442, 2696-2723, 2920-2963, 2969-2987.
[15] *Id.*, 9360-9380, 9426-9432, 9434-9463.
[16] *Id.*, 2357-2367, 2431-2440.

proper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am instructed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it. [10 Richardson, *Messages and Papers of the Presidents*, 98-99; Congressional Globe, 25th Cong., 3rd Sess., Vol. 7, Appendix, p. 405; 86 Cong. Rec. 2433-2434.]

Forty years later, Secretary of State Daniel Webster issued the following order to department heads at the direction of President William Henry Harrison:

SIR:

The President is of opinion that it is a great abuse to bring the patronage of the General Government into conflict with the freedom of elections, and that this abuse ought to be corrected wherever it may have been permitted to exist, and to be prevented for the future.

He therefore directs that information be given to all officers and agents in your department of the public service that partisan interference in popular elections, whether of State officers or officers of this Government, and for whomsoever or against whomsoever it may be exercised, or the payment of any contribution or assessment on salaries, or official compensation for party or election purposes, will be regarded by him as cause of removal.

It is not intended that any officer shall be restrained in the free and proper expression and maintenance of

> his opinions respecting public men or public measures, or in the exercise to the fullest degree of the constitutional right of suffrage. But persons employed under the Government and paid for their services out of the public Treasury are not expected to take an active or officious part in attempts to influence the minds or votes of others, such conduct being deemed inconsistent with the spirit of the Constitution and the duties of public agents acting under it; * * * [4 Richardson, *Messages and Papers of the Presidents*, 52.]

Again, on June 22, 1877, President Rutherford B. Hayes promulgated the following rule "applicable to every department of the civil service":

> No officer should be required or permitted to take part in the management of political organizations, caucuses, conventions, or election campaigns. Their right to vote and to express their views on public questions, either orally or through the press, is not denied, provided it does not interfere with the discharge of their official duties. No assessment for political purposes on officers or subordinates should be allowed. [7 Richardson, *Messages and Papers of the Presidents*, 450-451.]

The Civil Service Act of January 16, 1883, in addition to prohibiting specific conduct relating to political contributions by government employees,[17] empowered the President to promulgate "rules for carrying this act into effect," which should provide, *inter alia*, "that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so," and "that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body" (§ 2, 22 Stat. 403-404, 5 U. S. C. 633).

[17] 22 Stat. 403, §§ 11-14.

Pursuant to this authority and that contained in R. S. § 1753, 5 U. S. C. 631,[18] President Arthur, on May 7, 1883, promulgated the original Civil Service Rules, which in respect to political activity were couched in the language of the statute.[19] Civil Service Rule I was revised by President Theodore Roosevelt on June 3, 1907, to provide as follows:

> No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns. [Twenty-fourth Annual Report of the Civil Service Commission, p. 104.]

This provision was more drastic as respects employees in the competitive classified service than the second sentence of § 9(a) of the Hatch Act, to which the Civil Service Rule has now been made to conform (R. 41), in that it limited the expression of opinion on political subjects to such as might occur "privately" whereas the Act and the present Rule permit such expression without this limitation. Cf. the message of President Franklin D. Roosevelt, *supra*, n. 10; 40 Op. Atty. Gen. No. 2.

It is clear that the present statutory regulation of political activity on the part of officers and employees of the executive branch of the Government grows out of long experience and concern with the problem involved. By execu-

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[18] "The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, * * * and for this purpose he may * * * establish regulations for the conduct of persons who may receive appointments in the civil service." *Infra*, p. 56.

[19] 8 Richardson, *Messages and Papers of the Presidents*, 161; 18th Annual Report of the Civil Service Commission, p. 163.

tive warning, statutory provision, and executive order, controls have long been attempted. The line between permissible and forbidden conduct has been a shifting one. It cannot remain fixed as changing political methods come into vogue and government develops in size and in the nature of its activities. The problem is properly one of legislative concern and, within broad limits of constitutionality, must remain subject to legislative discretion. Whatever may be the faults attributable to the present rule, it is close to the line of historical development and does not transcend the power of Congress under a Constitution which is above all a practical charter of government.

Political management and participation in political campaigns are obviously not evil in themselves and are forbidden to officers and employees, other than those who are excepted from the prohibition, because of a danger of undesirable consequences which is deemed to be inseparable from such activities. The nature of these consequences is indicated partially by other provisions of the Hatch Act and the Civil Service Act and Rules and partially by the recognition which has been given in discussion and literature to certain relevant aspects of modern government. In general, the prohibition has the following purposes: (1) to eliminate one basis for politically-motivated removals from office and discrimination among employees; (2) to forestall the use of public employees and the abuse of official authority for partisan purposes; (3) to aid in providing for the legislature and the responsible heads of government an efficient administrative instrument for effectuating the policies which they determine upon; and (4) to establish confidence in the fairness of the public service, not only as between political parties themselves but also as between competing economic and social groups which

may work through parties or through the leaders and adherents of parties.

The appellants do not challenge the validity of other statutory provisions which are directed to one or another of these same ends, even though some of those provisions also limit the freedom of activity and of speech which government employees may enjoy as compared with other citizens. Provisions of the Criminal Code derived from the original Civil Service Act forbid government officers and employees (1) to solicit or receive political contributions or assessments from other such officers or employees (35 Stat. 1110, 18 U. S. C. 208, *infra*, p. 55; see *United States* v. *Wurzbach*, 280 U. S. 396); and (2) to make political contributions to other government employees or to members of Congress (35 Stat. 1110, 18 U. S. C. 211, *infra*, p. 56).[20] In addition, the Hatch Act, the Criminal Code, and the Civil Service Act and Rules forbid (1) the use of official authority to influence or interfere with elections or to coerce the political action of others (§ 2 of the Hatch Act, 18 U. S. C. 61a; § 2 of the Civil Service Act of 1883, 5 U. S. C. 633, *infra*, p. 57; Civil Service Rule I, *infra*, p. 58); (2) the discharge, promotion, or demotion of any officer or employee for giving or withholding any political contribution (35 Stat. 1110, 18 U. S. C. 210, *infra*, p. 58); and (3) the solicitation or consideration of information as to political opinion or of political recommendations in passing upon any application for admission to a civil service examination or making an appointment or promotion to a position in the competitive civil service (Civil Service Rule I, *infra*, pp. 58-59).

The Hatch Act provision here challenged may not be

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[20] These provisions are derived from §§ 11 and 14 of the Civil Service Act, 22 Stat. 403, 406-407. See the Act of March 4, 1909, 35 Stat. 1088, 1153, 1156. Section 12 of the Act, as carried forward (35 Stat. 1110, 18 U. S. C. 209, *United States* v. *Thayer*, 209 U. S. 39, *United States* v. *Newton*, 9 Mackey 226 (D. C.)) forbids the solicitation or receipt of political contributions in government offices.

considered apart from the context in which it appears, which includes the foregoing prohibitions; for partisan political activity by government employees forms "a part of the game"[21] of party maneuvering which includes the specific evils at which these prohibitions are aimed. It is understandable that appellants should refrain from challenging those restrictive provisions of law which are obviously designed for their protection as government employees; but in doing so and at the same time insisting upon a constitutional right to engage in activities which would *invite these as well as other evils*, they occupy an inconsistent position. Congress was entitled to conclude, as the Executive had previously done, that specific restrictions upon enumerated harmful acts were inadequate to cope with the problem that was of concern to it and that partisan political activity amounting to participation in management and in campaigns, should be forbidden. In the words of one writer, the prohibition here questioned, which extended to the great bulk of non-civil service employees the prohibition long contained in Civil Service Rule I, was reasonably considered to be necessary in order to avoid the "grave danger of a gradual but certain return of that political influence which enforcement of this rule had undoubtedly done a great deal to suppress." Mayers, *The Federal Service*, 166.[22]

B. THE PROHIBITION GROWS OUT OF THE NEEDS OF MODERN GOVERNMENT

Restrictions upon the political activity of public officers and employees, other than those in politically responsible

[21] See the remarks of Congressman Ramspeck at 84 Cong. Rec. 9616, with regard to a proposed amendment to § 2 of the Hatch Act which would have affirmatively sanctioned such activity.

[22] "The step from the Civil Servant politician to the Politicalized Civil Service is but a short one." *Report of the Committee on Parliamentary, Etc., Candidature of Crown Servants* (Cmd. 2408, 1925), p. 28. See also the opinion of the court below at R. 124-125.

policy-making positions,[23] are a characteristic feature of present-day government in the English-speaking world.[24] It has been stated that—

> • • • civil service neutrality is a fundamental requirement of democratic government, if an outright spoils system is to be avoided. Everywhere the democratic State is thus faced with the necessity of preserving the impartiality of its permanent servants • • •
>
> Since impartiality is a necessary concomitant of a permanent civil service in the democratic State, this fact is necessarily reflected in the status of public employees • • • It has been necessary in every democratic State to define these additional limitations and to compromise the conflicts which arise from the dual status of civil servants: as citizens and as impartial servants of the whole community. The result has uniformly been a limitation upon the political rights of the public employee. [Mosher and Kingsley, *Public Personnel Administration*, 385-386.]

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[23] Policy-making positions in the sense here intended and in the sense which is common in discussions of civil service problems are illustrated by the enumeration in § 9(a) of the Hatch Act of positions excepted from the prohibitions of that section. It is of course true that many lesser positions involve duties which are in part concerned with the formulation of policy (cf. the *Report of the President's Committee on Civil Service Improvement*, 77th Cong., 1st sess., H. Doc. 118, p. 31). Such positions, however, involve advice or the formulation of policy in a preliminary way or "interstitially" within the limits of directions previously marked out, rather than decision upon the directions themselves or upon major governmental measures. The positions which are designated as policy-making for present purposes involve politically-responsible policy-making in the latter sense.

[24] Kaplan, *Political Neutrality of the Civil Service*, 1 Pub. Pers. Rev. 10, 18. Leonard D. White, *Civil Service in the Modern State* (1930) contains texts and basic documents which relate to the civil service systems of 14 countries of the world before World War II. On the continent of Europe civil servants were not formally limited in their political activity but were, of course, specially charged with fidelity to the state and to the public welfare. See generally, "Civil Service," 3 Encyc. of the Social Sciences (1930) 515-523.

In Great Britain such restrictions began before the establishment of the competitive civil service, through the enactment in 1742 of a statute which rendered officers employed in the Treasury, the Admiralty, and the offices of the Principal Secretaries of State ineligible for election to Parliament.[25] The present rule requires an officer of the civil service, other than political officers and industrial employees, to resign immediately upon becoming a candidate,[26] while departmental regulations impose varying degrees of restriction upon political activity other than candidature.[27] In Canada [28] and South Africa [29] the restrictions are substantially the same as those in § 9(a) of the Hatch Act, here challenged, as respects both Dominion and provincial elections. In Australia officers of the government are ineligible for election to the Parliament of the Commonwealth [30] and are forbidden to comment publicly upon the administration of any department of the Commonwealth.[31] As these enactments evidence, there exists in respect to civil service officers and employees in English-speaking countries a tradition of abstention from partisan political activity, backed by varying degrees of legal enforcement, which in Great Britain has been characterized as "an unwritten but none the less general rule that they must maintain a reserve in political matters and not put themselves forward prominently on one side or the other." [32]

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[25] 15 Geo. II c. 22. See *Report of the Committee on Parliamentary, Etc. Candidature of Crown Servants* (Cmd. 2408, 1925), p. 6; Finer, *The British Civil Service* (1937), p. 201.

[26] Order in Council of July 25, 1927, London Gazette, July 26, 1927, p. 4799, re-enacting the substance of clause 16 of the Order of Jan. 10, 1910, London Gazette, Jan. 11, 1910, p. 239.

[27] Op. cit. *supra*, n. 25, pp. 8-9.

[28] Civil Service Act of 1918, c. 12, § 32 (R. S., 1927, Civil Service, § 55).

[29] Public Service & Pension Act of 1923 (Act No. 27), § 20(1)(f).

[30] Constitution Act, 63 and 64 Vict. c. 12, § 44(iv).

[31] Public Service Regulations, § 34(a) (Commonwealth Statutory Rules, 1935, p. 463). See also the South African Act, *supra*, n. 29, § 20(1)(e).

[32] Op. cit. *supra*, n. 25, p. 8.

Among the States of the Union, out of 21 having general civil service laws, 5 have provisions of the same scope as Section 9(a) of the Hatch Act here involved.[33] A substantial body of state legislation, therefore, follows the same principle as the challenged provision and would fall as an infringement of the Fourteenth Amendment, embodying the principles of the First Amendment, if appellants were to prevail upon the broad ground which they have advanced.

The reasons for limiting the political activity of public employees which are now most often advanced in discussion, relate to the advantages of political neutrality in the civil service, rather than merely to prevention of the grosser evils of patronage and discrimination among employees on partisan grounds. As early as 1884 a British Treasury Minute expressed a "strong sense of the public injury which must be the consequence of any departure" from the "essential" condition that the members of the civil service "should remain free to serve the Government of the day, without necessarily exposing themselves to public charges of inconsistency or insincerity."[34] Thirty years later the Royal Commission on Civil Service reported[35] its view that it would "be disastrous if the feeling should arise that the

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[33] Ala. Code (1940), tit. 12, § 157; Conn. Gen. Stat. (Supp. 1939), c. 105a, § 698e; Ohio Gen. Code (Page, 1937), § 486-23; Pa. Stat. Ann. (Purdon, 1942), § 741.904; R. I. Acts & Resolves, 1939, p. 118. Such provisions have been upheld as constitutional in *McCrory* v. *City of Philadelphia*, 345 Pa. 154 (1942); *Duffy* v. *Cooke*, 239 Pa. 427, 441 (1913); and *Ricks* v. *Dept. of State Civil Service*, 200 La. 341 (1942).

[34] Op. cit. supra, n. 25, p. 7 (Cmd 2408)

[35] Cd. 7338 (1914), p. 97.

effectiveness of a legislative policy would be in any degree dependent upon the political bias of those administering it" and that, "if restrictions on the political activity of public servants were withdrawn", "the public might cease to believe in the impartiality of the permanent Civil Service" and Ministers might lose confidence in their subordinates and be influenced by the utterances and writings of staff members in making promotions to responsible positions. "Ministerial patronage" would return and the Civil Service would cease to be capable of loyal service to all parties alike. "The result would be destructive of • • • one of the most honorable traditions of our public life." [36]

In this country too the need of an impartial permanent civil service, chosen for proficiency and governe in respect to promotions by the principle of recognizing ability and performance, and the inconsistency of political activity by its members with the maintenance of such a service, have been recognized. The President's Committee on Civil Service Improvement, reporting in 1941, laid down the following as two of the special considerations which it kept in mind in framing its recommendations: [37]

> 3. Government officials and employees, except those occupying positions the duties of which are to determine policy, should be free from partisan obligations, either in securing initial appointment or in advancement from time to time; they should be under no obligation to maintain membership in any political party or to make contributions to party funds; and they should be fully protected against partisan influence in making decisions in particular cases or otherwise in the performance of their official work.

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[36] See also the *Report of the Board of Enquiry • • • to Investigate Certain Statements Affecting Civil Servants*, Cmd. 3037 (1928), pp. 21-22.

[37] 77th Cong., 1st sess., H. Doc. 118, p. 22.

4. All Government officials and employees are by virtue of their employment in honor bound to conscientious and loyal service, accepting without qualification and faithfully executing the policy and program of the Government of the day, irrespective of their private views concerning its wisdom.

These views accord with the body of informed opinion upon the subject.[38]

The regulatory functions of modern governments,[39] impinging as they do upon the interests of economic and social groups at many points, make it even more important that both fairness and public confidence in the fairness of administration be maintained.[40] Primarily the problem in this connection relates to fairness (as well as to competence) with respect to economic and social issues, often of a technical nature,[41] rather than with respect to matters which in the first instance involve party politics. The connection between party politics and economic interests which seek to attain their ends through party channels as well as otherwise is well known, however;[42] and the legitimacy of pro-

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[38] See: Field, *Civil Service Law* (1939); Dawson, *The Principle of Civil Service Independence* (1922); Wei Kung Chen, *The Doctrine of Civil Service Neutrality in Party Conflicts in the United States and Great Britain* (1937); *White, Government Career Service* (1935); Meriam, *Public Personnel Problems* (Brookings Institution, 1938), pp. 285-286.

[39] The growth and importance of these functions are too familiar a matter, especially to lawyers, to require review here. See, generally, *Final Report of the Attorney General's Committee on Administrative Procedure* (1941); C. F. Bevis, *Administrative Commissions and the Administration of Justice* (1928, 2 Univ. of Cin. L. Rev. 1, 4 *Selected Essays on Constitutional Law* 92.

[40] J. Donald Kingsley, *Representative Bureaucracy* (1944), pp. 221, 280-281.

[41] Cf. Frankfurter, *The Young Men Go to Washington*, in *Law and Politics* (1939) pp. 238-249; Corwin, *The President's Removal Power under the Constitution* (1927), 4 *Selected Essays on Constitutional Law* 1467, 1470-1471.

[42] Cf. Edward M. Sait, *American Parties and Elections* (3d ed., 1942), pp. 642-653.

tecting regulatory agencies from political as well as other pressures has been recognized by this Court [43] and by commentators. [44]

The Congress which is empowered to provide legislatively for specific protections to the impartial performance of their functions by administrative officers is not disabled by Constitutional provisions from imposing restraints upon the conduct of the officers themselves which are generally deemed to be conducive to the same over-all purpose. There must, it is true, be a reasonable relationship between means and ends; but creation of the basic conditions of good administration in terms of official behavior as well as in terms of tenure and conditions of employment is no less legitimate than striking at the direct imposition of pressures from outside or from above. The provision of the Hatch Act which is here challenged has, we believe, been validly devised for a proper purpose.

Nor does the exercise of legislative control over the partisan political activity of officers and employees impose upon them a condition of weak neutrality as to public questions in either their personal or their official capacities. They may entertain and publicly and privately express vigorous personal views upon significant issues; and in their official relations their work and their advice may benefit from strong convictions frankly stated.[45] A single

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[43] *Humphrey's Executor* v. *United States*, 295 U. S. 602, 624-625. The modern history of restrictions upon the President's removal power is set forth in the dissenting opinion of Mr. Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52, at 252-264, 276-283. The present provision limiting the removal power as to employees in the classified civil service is contained in § 6 of the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 652.

[44] Eastman, *The Place of the Independent Commission* (1928), 12 Const. Rev. 95; Henderson, *The Federal Trade Commission* (1924), p. 341; Robinson, *The Hoch-Smith Resolution and the Future of the Interstate Commerce Commission* (1929), 42 Harv. L. Rev. 610.

[45] See J. Donald Kingsley, *Representative Bureaucracy* (1914) pp. 274-278. It is significant that the author of this study of the British civil service

channel of expression and activity—namely political management and partisan participation in election campaigns otherwise than in a rank-and-file capacity—is alone denied to them for reasons of public policy. The deprivation may be substantial for some individuals; but at most it imposes upon them a choice between, on the one hand, public employment with this restriction and, on the other hand, alternative methods of earning a livelihood.

The legal restriction here in question is not more severe than the conventional restraint which attaches to numerous public and private employments.[46] The fact that it is embodied in a statute need occasion no surprise and gives rise to no problem; for the conditions of public employment are normally specified by law instead of by contract. As to government service, therefore, statutory provisions may fix terms which legislation could hardly impose upon private employees.[47] That there are constitutional limits to such restrictions may be conceded; but the power of the Government as employer has broader scope than its regulatory authority.

Acceptance of the widely-held view that political parties are essential to democratic government does not, of course, lead to the corollary that the legislature should be deprived of power to forbid the participation of the bulk of public

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as a responsible participant in policy, who in the cited passage recognizes limitations upon the doctrine of the impartiality of officials, approves of restrictions upon the political activity of civil servants and points out the difficulty of classifying public employees in this connection. Pp. 220-222.

[46] The preacher, the teacher, and the corporate executive can only rarely become active political partisans while retaining their posts. One of the severest codes of abstention from party politics currently in effect is, of course, that which members of the Federal judiciary observe.

[47] The crucial wage item in the employment relation serves as a sufficient illustration. Although under ordinary circumstances it doubtless must be left to the bargaining process as between private employers and employees, subject to legislatively prescribed standards, *United States* v. *Darby*, 312 U. S. 100, 125; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257, it is of course fixed by statute for numerous government employees.

employees in the active phases of party work. Even if it be true that groups of individuals either seeking or holding office have formed the permanent core of each of the parties in this country during the past century, it does not follow that this core need embrace more than a small portion of the offices or even that no other fundamental basis of party organization is possible. The opinion of most thoughtful students of the subject is to the contrary. The matter is in any event one which lies wholly within the legislative province;[48] for the regulation of the party system, like that of the public service, presents problems which can only be solved in the light of current conditions and needs. Adaptation of democratic traditions to new circumstances is a central requirement. In carrying forward the developing tradition of an impartial civil service, Congress has recognized a fundamental governmental trend and has not failed to take account of the needs of our political system.

C. THE PROVISION IS NOT REPUGNANT TO THE FIRST AMENDMENT

Appellants' contention that the second sentence of Section 9(a) of the Hatch Act constitutes an unconstitutional invasion of the freedoms guaranteed by the First Amendment (Br. 12-19) tends to ignore the section's third sentence. That sentence specifically permits all persons covered by the section to express their opinions, publicly as well as privately,[49] on all political subjects and candidates. They

[48] Organized parties did not, of course, exist in this country at the time the Constitution was adopted or for some time after, and Washington warned against the "spirit of party" in his farewell address. They are not in themselves, therefore, objects of constitutional protection. As to the development and nature of American parties see generally Merriam and Gosnell, *The American Party System* (Rev. ed., 1937) and the literature which is copiously cited therein. The probable effect of "the decline of patronage as a prime factor in the party" is discussed at pp. 457-461.

[49] 40 Op. Atty. Gen. No. 2; see also Sen. Doc. 105, 76th Cong., 1st Sess., supra, n. 10, pp. 2-4.

may do so singly or in concert, at all times and places except in circumstances which cause their activity to assume the character of taking an "active part in political management or in political campaigns", and still retain their employment.[50]

The question under the First Amendment is whether this is a reasonable provision and therefore within the discretion of Congress—whether, in the absence of restriction, the political activities proscribed by the second sentence would, in the words of Mr. Justice Holmes, "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," *Schenck* v. *United States*, 249 U. S. 47, 52 or diminish the soundness of

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[50] Moreover, certain spheres of political activity, such as nonpartisan elections and constitutional and other referenda, are specifically left open to Federal employees.

The Hatch Act authorizes Federal employees to engage "in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party." § 18, 18 U. S. C. 61r.

The Hatch Act further provides that "Whenever the United States Civil Service Commission determines that, by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this Act are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or in political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons." § 16, 18 U. S. C. 61p. See R. 53-56.

The prohibited political activities are spelled out in the Civil Service Commission's pamphlet, Form 1236 (Jan., 1944), at pp. 47-53 of the record.

the public service. "It is a question," Mr. Justice Holmes continued, "of proximity and degree."

There can be no question that "Congress has a right to prevent" the "substantive evils" of a spoils system and of "pernicious political activities" in the Federal service. We submit that, as shown above, there is sufficient "proximity" between these evils and the prohibited political activity by Government employees to support the congressional finding that the maintenance of a sound and disinterested civil service demands the elimination of such political activities by employees. See *Ex parte Curtis*, 106 U. S. 371.

The First Amendment does not guarantee that all persons may at all times and in all places speak or write as they may please; in the words of this Court, the "right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571.[51] Moreover, the circumstances in which the particular conduct is forbidden materially affect the reasonableness and validity of the restriction. Words which in some circumstances would be constitutionally protected, may be prohibited by the Congress in other circumstances. Cf. *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206; *Schenck* v. *United States*, 249 U. S. 47, 52.

Here the restrictions are limited to Federal employees, because the "circumstances" under which the proscribed conduct would be carried out—i. e., by those serving the public through the United States Government—were deemed by Congress to render conduct undesirable which

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[51] See also *Schenck* v. *United States*, 249 U. S. 47; *Whitney* v. *California*, 274 U. S. 357, 373 (Brandeis, J., concurring); *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477; *Gilbert* v. *Minnesota*, 254 U. S. 325, 332.

under other conditions (as by persons not within the Federal service) would be unobjectionable. The provision is distinguishable only in degree from those which prohibit the solicitation of political contributions by government employees from other government employees (Crim. Code § 118, *infra*, p. 55), or the solicitation of political contributions in government offices (Crim. Code § 119, *infra*, p. 55), or which provide for the prompt discharge of a government employee "who shall request, give to, or receive from, any other" government employee anything of value for political purposes (Section 6 of the Act of August 15, 1876, *infra*, p. 56). To the extent indicated, all these statutes place limitations upon the words and writings of those whose solicitations are thereby interdicted; nevertheless, their validity may not successfully be attacked. *United States* v. *Wurzbach*, 280 U. S. 396; *United States* v. *Thayer*, 209 U. S. 39; *Ex parte Curtis*, 106 U. S. 371; *United States* v. *Newton*, 9 Mackey 226 (D. C.).

Indeed, the provision here under attack is less drastic in the sanction it invokes than Sections 118 and 119 of the Criminal Code, for the prohibition against active political management and campaigning is enforceable only by dismissal from the service, not by fine and imprisonment. The second sentence of Section 9(a) is like other statutes which impose certain "legal consequences" other than punishment upon "verbal actions." Cf. *National Labor Relations Board* v. *M. E. Blatt Co.*, 143 F. 2d 268, 274 (C. C. A. 3), certiorari denied, 323 U. S. 774; *Gitlow* v. *Kiely*, 44 F. 2d 227, 228 (S. D. N. Y.), affirmed *per curiam*, 49 F. 2d 1077 (C. C. A. 2), certiorari denied, 284 U. S. 648; *National Labor Relations Board* v. *New Era Die Co.*, 118 F. 2d 500, 505 (C. C. A. 3); *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 142 F. 2d 922 (C. C. A. 3). Stated in terms specifically directed to the instant case, the individual appellants may "have a constitutional right

to talk politics," but they have no constitutional right to be government employees while engaging in politics in the prohibited manner. *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220; *People* v. *Crane*, 214 N. Y. 154, 177, 178, affirmed, 239 U. S. 195; *Stowe* v. *Ryan*, 135 Ore. 371; *Commonwealth ex rel. Rotan* v. *Hasskarl*, 21 Pa. Dist. R. 119. See also, *Duffy* v. *Cooke*, 239 Pa. 427. Cf. *Gitlow* v. *Kiely*, 44 F. 2d 227, 229-230 (S. D. N. Y.), affirmed *per curiam*, 49 F. 2d 1077 (C. C. A. 2), certiorari denied, 284 U. S. 648.

To hold the restriction which is here involved violative of the First Amendment would require the substitution of judicial judgment for that of the Congress as to the extent of the harm to the public service which may arise out of the political activities of Federal employees and as to the wisdom of the particular measure enacted to avert this damage. This Court has consistently declined to make such a substitution in other situations. *Polish Alliance* v. *Labor Board*, 322 U. S. 643; *Hirabayashi* v. *United States*, 320 U. S. 81; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381; *United States* v. *San Francisco*, 310 U. S. 16, 26. See also *United States* v. *Newton*, 9 Mackey 226, 231 (D. C.). The same reasoning is applicable here notwithstanding the claimed application of the First Amendment; for central to this case is the authority of Congress over the public service, which has here been applied without resort to other powers or to the bestowal of unlimited administrative discretion such as contributed to the invalidity of the regulations in *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; and *Cantwell* v. *Connecticut*, 310 U. S. 296.

Nor is it valid to contend as appellants so largely do in their brief, that Congress has gone beyond its power in striking at the root of much of the problem with which this and related legislation deals, instead of confining itself

to the prohibition of specific pernicious practices. This Court has long recognized that Congress may elect to deal with the sources of evils which are properly of concern to it, even to the extent of controlling activity or conditions which otherwise would be beyond its power to reach. *Wickard* v. *Filburn*, 317 U. S. 111, 128-129. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36-43; *United States* v. *Darby*, 312 U. S. 100, 121-123.

Equally well recognized is the power of Congress to embark upon comprehensive programs of development, touching wide ranges of activity otherwise beyond congressional scope, in furtherance of objects which lie within its authority. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508. The relation of the prevention of political activity on the part of government employees to the more positive need for an impartial civil service is evident. (See *supra*, pp. 26-32.)

It is also clear that political activity by officers and employees has produced and might again produce politically motivated discharges of personnel as well as discrimination in promotions and other bestowals of favor by official superiors. Less evident but nonetheless real are the subtle and elusive forms of pressure upon employees to induce active political participation which are possible if such participation is lawful. In the words of one writer, "The line between contributions or service rendered as the result of coercion and that which is really voluntary may be and often is impossible to draw. No word of threat or promise may be spoken by the superior officer, yet the employee may know perfectly well that a contribution or activity on his part will earn its due reward and conversely that failure to contribute, or inactivity, will bring swift and sure retribution." Mayers, *The Federal Service*, 160-161. See *Ex parte Curtis*, 106 U. S. 371; *I. A. of M.* v. *Labor Board*, 311 U. S. 72, 78; *National Labor*

Relations Board v. *Griswold Mfg. Co.*, 106 F. 2d 713, 722 (C. C. A. 3).[52]

We submit that, in the light of these considerations, Congress was empowered to proceed to fundamentals in legislating against a "politicalized civil service" by providing, as it did in Section 9(a) of the Hatch Act, that active participation in politics by an officer or employee should lead to his removal from the service.

D. THE PROVISION IS NOT REPUGNANT TO THE FIFTH AMENDMENT

The same considerations which sustain the second sentence of Section 9(a) as against the charge that it infringes the First Amendment, also negative most of the grounds of the contention that it is repugnant to the Fifth Amendment. In making this contention appellants allege that the section unduly restricts appellants' activities, discriminates against Federal employees and among classes of such employees, and is vague and indefinite (R. 8, 129, 134-135). We believe that none of these contentions is valid.

A statutory provision, merely because it restricts the activities of one segment of the population while permitting them to the remainder, does not constitute an unconstitutional deprivation of liberty or otherwise run afoul

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[52] The susceptibility of an employee to the wishes of his employer or supervisor is a matter of common knowledge, frequently recognized by the courts. "* * * the position of the employer is a most delicate one. * * * the voice of authority may, by tone inflection, as well as by the substance of the words uttered, provoke fear and awe quite as readily as it may bespeak fatherly advice. The position of the employer * * * carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist." *National Labor Relations Board* v. *Falk Corporation*, 102 F. 2d 383, 389 (C. C. A. 7). Nor need the employer's wishes be expressed. "The influence of [an official superior in government service] is not less effective if silently exerted." *People* v. *Connolly*, 152 N. Y. Supp. 495, appeal dismissed, 216 N. Y. 706.

of the Fifth Amendment so long as a basis for the distinction exists. See *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224. Here the obvious bases for the distinction are the objective of the statute to provide a sound public service and the fact that the Government as an employer can and frequently must impose restrictions and regulations regarding its employees which are not applicable to the public at large. *Ex parte Curtis*, 106 U. S. 371; *Atkin* v. *Kansas*, 191 U. S. 207; *Ellis* v. *United States*, 206 U. S. 246; *Heim* v. *McCall*, 239 U. S. 175; *United States* v. *Wurzbach*, 280 U. S. 396; *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195; *Lee* v. *Lynn*, 223 Mass. 109, 112; *Opinion of the Justices*, 303 Mass. 631, 641. So long as such restrictions and regulations are not arbitrary and bear a reasonable relation to legitimate ends to be attained—here the development of a sound and impartial civil service—no question as to their constitutionality can arise. The validity of similar restrictions upon the activities of government employees has in fact long been recognized. *Ex parte Curtis*, 106 U. S. 371, 372-373; *United States* v. *Thayer*, 209 U. S. 39; *United States* v. *Wurzbach*, 280 U. S. 396; *United States* v. *Newton*, 9 Mackey 226 (D. C.); *McAuliffe* v. *New Bedford*, 155 Mass. 216; *People ex rel. Clifford* v. *Scannell*, 74 App. Div. 406; *Stowe* v. *Ryan*, 135 Ore. 371; *Commonwealth ex rel. Rotan* v. *Hasskarl*, 21 Pa. Dist. R. 119. See, also, *Duffy* v. *Cooke*, 239 Pa. 427.

Moreover, persons standing in an employment relation to the United States have no valid ground to object to separate treatment related to such employment (cf. *Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 579), particularly where they undertook their employment after the regulations of which they complain were promulgated. Here, all the individual appellants began their employment with the United States and became classified employees after the 1907 amendment to Civil Service Rule I,

supra, p. 23 (R. 2-3, 14, 16, 19, 22-23, 26), and six of them after the passage of the Hatch Act (R. 11-12, 17-18, 20, 25, 28).

Similarly without substance is the suggestion in appellants' brief (p. 22) that Section 9 (a) may be invalid as to unclassified employees because they do not enjoy the same protections to tenure as classified employees. The section applies alike to both classes, eliminating the discrimination in the rules governing political activity which existed prior to its passage when active political management and campaigning were forbidden to classified employees by Civil Service Rule I but not to the unclassified (see *supra*, p. 23). The protections against political assessments and discrimination on political grounds, accorded to government employees by Sections 120 and 121 of the Criminal Code (see *supra*, p. 25) extend, however, to all employees whether classified or not. If a *quid pro quo* going beyond the advantages of current status as a government employee were needed for the restrictions imposed by an otherwise valid regulation, those sections would supply it. We think it is evident, however, that the validity of statutory safeguards to the public service cannot be made to turn upon any such considerations. The constitutionality of Section 9 (a) does not depend upon the degree of the safeguards surrounding the tenure of those who come under it. If it is valid as to classified employees, it is valid as to the unclassified.[53]

Appellants' point (Br. 35-39) that the inclusion of mechanical, clerical, and custodial employees in the prohibition of the second sentence of Section 9 (a) renders the provision

[53] The current importance of the exclusion of groups of Federal employees from the classified civil service is much less than it was at the time the Hatch Act was adopted. The Act of November 26, 1940, 54 Stat. 1211, 5 U. S. C. 631a, authorized the inclusion in the classified service of the great bulk of Federal employees previously excluded by statute. They were subsequently "covered in" pursuant to Executive Order 8743 of April 23, 1941, 3 C. F. R., Cum. Supp. (1943), p. 927.

unreasonable, breaks down upon analysis. It is true that the performance of the work of these employees does not, by reason of the nature of the work, require political neutrality on their part. Participation in political management or campaigns may not, however, be consistent with diligence in the performance of the work—a factor which did not go unnoticed in the congressional debates.[54] As to the evils of political "spoils" and discrimination in relation to employees, moreover, the lowlier positions are, if anything, more important than the higher ones;[55] for as to the latter the demands of the positions, as well as interest by professional groups in their staffing and in the work, are likely in any event to retard improper practices; whereas the incumbents of routine positions may carry on in a different atmosphere. The routine positions, moreover, are much more numerous and would supply more political workers if the attempt were made to secure political participation by employees. Furthermore, it would be difficult to draw the line between those positions which require political impartiality on the part of the incumbents and those which do not.[56] It therefore cannot be said that a broad prohibition, applicable to all employees, is unreasonable.

There are excepted from the operation of the second sentence of Section 9 (a) only certain enumerated policy-making officials, certain part-time employees serving without compensation or with merely nominal compensation in connection with the war effort, and employees of certain educational and research institutions. § 21, 18 U. S. C. 61u. Such a classification is properly within the province

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[54] See the remarks of Congressman T. V. Smith, 86 Cong. Rec. 9451, with reference to the improvement which the Hatch Act of 1939 accomplished in this regard.

[55] "The thing • • • [the political boss] sets the greatest store by are the smaller places, the labouring jobs." Frank R. Kent, *The Great Game of Politics* (2d ed., 1930), p. 99. See also the remarks of Senator Hatch at 86 Cong. Rec. 2433.

[56] See *supra*, n. 45.

of Congress. The Fifth Amendment, which, unlike the Fourteenth, contains no equal protection clause, restrains only such discriminatory legislation as, due to its arbitrary or injurious character, amounts to a denial of due process. *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *Detroit Bank* v. *United States*, 317 U. S. 329, 337-338; *Second Employers' Liability Cases*, 223 U. S. 1, 52-53.[57] The distinctions between employees which Congress has recognized in the Hatch Act have a clearly demonstrable basis.

The reason for Congress' exemption of certain enumerated officials[58] from the operation of the second sentence of Section 9 (a) is clear. They are policy makers who have historically always been identified politically with the controlling administration. Such an identification, besides its long historical acceptance, has been justified by experts in the field. "The convention of neutrality cannot, in the nature of things, be applied to policy-determining officers." Mosher and Kingsley, *Public Personnel Administration*, 385.[59] Such officers may and frequently do change as the administration changes its political complexion; it would be impractical and unreal to expect such officials to maintain a neutral or non-partisan attitude. Indeed, the very nature of the government requires, not that these policy makers remain

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[57] See also *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584-585; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401; *Helvering* v. *Lerner Stores Co.*, 314 U. S. 463, 468.

[58] "(1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal Laws." 18 U. S. C. 61h(a).

[59] See, also, Report of the President's Committee on Civil Service Improvement, House Doc. 118, 77th Cong., 1st Sess., p. 22: "Government officials and employees, except those occupying positions the duties of which are to determine policy, should be free from partisan obligations . . ."

impartial, but, on the contrary, that they reflect the wishes of the electorate expressed at the polls. See 84 Cong. Rec. 4303, 9601, 9630, 9672; 86 Cong. Rec. 2432. The distinction made in Section 9 (a) thus has a sound and reasonable basis.

The exemption from the operation of the second sentence of Section 9 (a) of part-time officers and part-time employees "without compensation or with nominal compensation serving in connection with the existing war effort" (18 U. S. C. 61h(a))[60] is a temporary provision of the Hatch Act, inserted in 1942 and expiring on December 31, 1945.[61] The basis for this exemption is stated as follows by the Senate Committee on the Judiciary in its Report (No. 989, 77th Cong., 2d Sess., pp. 6-7):

> The Federal Government has need of the services of the many prominent and patriotic citizens who are glad to render their assistance without compensation or upon payment of a nominal sum in lieu of compensation. Outstanding examples of such citizens are the members of the local and appeal boards of the Selective Service System throughout the Nation, the members of the tire-rationing boards, special assistants to the Attorney General designated by the Department of Justice as hearing officers for conscientious-objector cases, and members of the enemy alien hearing boards created and established after the declaration of war.
>
> The mutual desire of the Government and its patriotic citizens, who are often active in political life, that their services be accepted in this emergency should not be hampered by the restrictions in existing law which would require such citizens, as a condition of

[60] It should be noted that from this exempted class are excepted those officers and employees serving "in any capacity relating to the procurement or manufacture of war material." 18 U. S. C. 61h (a).

[61] Or at "such earlier time as the two Houses of Congress by concurrent resolution, or the President, may designate." The exemption was added to the Hatch Act by Title VII of the Second War Powers Act, 1942, 56 Stat. 181, and expires with Title VII of that Act.

the performance of valuable and voluntary services, to abstain from participation in the political life of their communities.

It was clearly reasonable for Congress to distinguish between career or permanent government employees, who are expected to devote themselves to their government positions and whose livelihoods are derived from the Government, and those employees who, in the interest of the war effort, donate a part of their time to the Government, either gratuitously or for merely nominal compensation.

The exemption of employees of certain educational and research institutions [62] from the operation of the second sentence of Section 9 (a) has equally a reasonable basis. The exemption was introduced into the Act in 1942, after "the attorneys general of Ohio and Minnesota ruled that teachers in land-grant colleges and in schools being assisted under the Smith-Lever Act and Bankhead-Jones Act was subject to the [Hatch] act." [63] Report, House Committee on the Judiciary H. Rep. 2296, 77th Cong., 2d Sess.; 88 Cong. Rec. 7773. Obviously, the interest of the Federal Government in divorcing politics from its civil service and protecting its employees from political pressures does not extend to educational institutions which may incidentally receive financial aid, frequently small, from the Federal Government. See 88 Cong. Rec. 7772. Obviously, also, the conduct of the Government's business by Federal employees is a far different thing from the work of teachers whose

[62] "* * * any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization." 18 U. S. C. 61u.

[63] Section 12(a) of the Hatch Act, 18 U. S. C. 61l(a), imposes the proscription of the second sentence of Section 9(a) upon officers and employees of State and local agencies "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency."

function of disseminating information and provoking thought, political and otherwise, might be interfered with were the prohibitions of the second sentence of Section 9 (a) made applicable to them. See 88 Cong. Rec. 7772.

The complaint and the affidavits of appellants attached to their motion for interlocutory injunction fully answer their contention that the second sentence is vague and indefinite. In their pleadings and affidavits, the appellants set out a long list of activities which they allege are proscribed by Section 9(a) of the Act (R. 4, 6, 12, 15-29), apparently having had little difficulty in determining what is meant by taking an "active part in political management or in political campaigns."

A similar contention was rejected by this Court in *United States* v. *Wurzbach*, 280 U. S. 396, where the meaning of the phrase "political purpose" was held to be sufficiently definite for the purposes of Section 118 of the Criminal Code, 18 U. S. C. 208, making criminal the solicitation of contributions for a "political purpose" by government employees from government employees.[64] The phrases "political management" and "political campaigns" would seem to be at least sufficiently definite for inclusion in a non-criminal provision. Cf. *Fox* v. *Washington*, 236 U. S. 273.

Moreover, the activities prohibited by Section 9(a) are further particularized by Section 15 of the Hatch Act, 18 U. S. C. 61o, which provides that Section 9(a) "shall be deemed to prohibit the same activities . . . as the United States Civil Service Commission has heretofore determined are at the time this section takes effect[65] prohibited on the part of employees in the classified civil serv-

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[64] See Criminal Code § 122, 18 U. S. C. 212.

[65] July 19, 1940, 54 Stat. 767, c. 640, § 4.

ice of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." By virtue of that provision, the definitions of political activities forbidden by the Civil Service Commission prior to July 19, 1940, are incorporated into the Hatch Act. The definitions of prohibited conduct were at that time and still are publicized by the Commission and brought to the attention of all Federal employees. See R. 32, 71-111, *passim*, particularly 75-76, 80-86; 86 Cong. Rec. 2341-2342, 2938-2940; see, also, R. 36-70, *passim*, particularly 47-53; R. 114A; Chapter C2 of the Civil Service Commission's *Federal Personnel Manual*, currently being published in looseleaf form.

E. THE PROVISION DOES NOT OFFEND AGAINST THE NINTH OR TENTH AMENDMENTS

Appellants' contention (R. 8, 129, 134) that the second sentence of Section 9(a) of the Hatch Act constitutes "a deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments"[66] is not pressed in their brief. Obviously the employment by the Federal Government of "means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end" (*United States* v. *Darby*, 312 U. S. 100, 124) does not invade the reserved powers. *Ex parte Curtis*, 106 U. S. 371, 372; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, 325; *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 406; *Gordon* v. *United States*, 117

[66] Cf. Section 12(a) of the Act, 18 U. S. C. 61*l*(a), which imposes the prohibitions of the second sentence of Section 9(a) upon officers and employees of State and local agencies "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency" and which has been upheld against attack as in violation of the Tenth Amendment. *Neustein* v. *Mitchell*, 52 F. Supp. 531 (S. D. N. Y.); *Stewart* v. *United States Civil Service Commission*, 45 F. Supp. 697 (N. D., Ga.).

U. S. 697, 705; *United States* v. *Butler*, 297 U. S. 1, 63; Const., Art. I, Sec. 8. There can be no doubt of the power of Congress to make appropriate provision for employees to carry on the Government's work (Const., Art. II, Sec. 2, Par. 2), and implicit in this power is the authority to make all laws necessary and proper for the governance of such employees. *Ex parte Curtis*, 106 U. S. 371.

The right of the citizen to take an active part in political management and political campaigns, moreover, does not imply that there is a constitutional right to hold a government position while engaging in these activities. Rather, when an individual accepts employment with the Government, he submits to such reasonable regulation of Federal employees as Congress sees fit to impose. See *Ex parte Curtis*, 106 U. S. 371; *People* v. *Crane*, 214 N. Y. 154, 177, 178, affirmed, 239 U. S. 195; *Stowe* v. *Ryan*, 135 Ore. 371; *People ex rel. Clifford* v. *Scannell*, 74 App. Div. 406; *Commonwealth ex rel. Rotan* v. *Hasskarl*, 21 Pa. Dist. R. 119; *Duffy* v. *Cooke*, 239 Pa. 427; *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220; cf. *Egan* v. *United States*, 137 F. 2d 369, 374 (C. C. A. 8), certiorari denied, 320 U. S. 788.

CONCLUSION

Even were there doubt as to the constitutionality of the challenged provision of Section 9 (a) of the Hatch Act, "every possible presumption" would arise "in favor of the validity of the statute." *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Graves* v. *Minnesota*, 272 U. S. 425, 428; *United States* v. *Curtis*, 12 Fed. 824, 840 (S. D. N. Y), affirmed, 106 U. S. 371; *United States* v. *Newton*, 9 Mackey 226 (D. C.); *Whitney* v. *California*, 274 U. S. 357; *Wampler* v. *Lecompte*, 282 U. S. 172; *Gitlow* v. *New York*, 268 U. S. 652; *Nebbia* v. *New York*, 291 U. S. 502. This is particularly true where, as here, the provision under attack has a genealogy of substance extending back to the very beginnings of the nation. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 401; *United States*

v. *Midwest Oil Co.*, 236 U. S. 459, 472-474; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 525; *City of Tulsa* v. *Southwestern Bell Telephone Co.*, 75 F. 2d 343, 351 (C. C. A. 10), certiorari denied, 295 U. S. 744; *De Soto Motor Corporation* v. *Stewart*, 62 F. 2d 914, 915-916 (C. C. A. 10).

In this case, not only is there a long tradition in the history of this country lying behind the prohibition which Congress has enacted, but there is involved an integral feature of the system of civil service which has been developed to meet the needs of modern government—a system which has been called "the one great political invention" of 19th century democracy. Graham Wallas, *Human Nature in Politics* (3d ed., 1921), p. 263. This political invention rests upon the conception that it is "upon serious and continued thought and not upon opinion that the power to carry out our purposes, whether in politics or elsewhere, must ultimately depend." *Id.*, p. 267. A deliberate legislative enactment, designed to aid in carrying such a conception into effect, merits every safeguard which the process of constitutional adjudication has evolved in behalf of challenged legislation. For this reason, and for those advanced in the previous portions of our brief, we respectfully submit that the court below should be directed to dismiss the appellants' complaint or, if it be determined that the court has jurisdiction, that the judgment below should be affirmed.

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John F. Sonnett,
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David L. Kreeger,
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Ralph F. Fuchs,
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November, 1945.

APPENDIX

I. CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8, of the Constitution provides, in part, as follows:

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

2. Article II, Section 2, of the Constitution provides, in part, as follows:

> The President * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. * * *

3. The First Amendment provides, in part, as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4. The Fifth Amendment provides, in part, as follows:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *

5. The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

6. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. STATUTES INVOLVED

1. The Hatch Act, 18 U. S. C. § 61-61x, provides in part as follows:

> § 9 (18 U. S. C. § 61h). (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate,

and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal Laws. (b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

§ 12(a) (18 U. S. C. § 61*l*(a)). No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.

§15 (18 U. S. C. § 61o). The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed

to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

§ 16 (18 U. S. C. § 61p). Whenever the United States Civil Service Commission determines that by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this subchapter are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or in political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons.

§ 18 (18 U. S. C. § 61r). Nothing in the second sentence of section 9(a) or in the second sentence of section 12(a) of this title shall be construed to prevent or prohibit any person subject to the provisions of this subchapter from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party.

For the puropses of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party.

§ 21 (18 U. S. C. § 61u). Nothing in sections 2, 9(a), or 9(b), or 12 of this title shall be deemed to prohibit or to make unlawful the doing of any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization.

2. Sections 118 to 122 of the Criminal Code, 18 U. S. C. §§ 208-212, inclusive, provide:

18 U. S. C. § 208. It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

18 U. S. C. § 209. No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208 of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

18 U. S. C. § 210. No officer or employee of the United States mentioned in section 208 of this title shall dis-

charge, or promote, or degrade, or [illegible] change the official rank or compensation [illegible] officer or employee, or promise or threaten [illegible] for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

18 U. S. C. § 211. No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

18 U. S. C. § 212. Whoever shall violate any provision of sections 208 to 211 of this title shall be fined not more than $5,000, or imprisoned not more than three years, or both.

3. Section 6 of the Act of August 15, 1876, 19 Stat. 169, 18 U. S. C. § 213, provides:

Any executive officer or employee of the United States not appointed by the President, with the advice and consent of the Senate, who shall request, give to, or receive from, any other officer or employee of the Government any money or property or other thing of value for political purposes shall be at once discharged from the service of the United States.

4. R. S. § 1753, 5 U. S. C. § 631, provides:

The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may

...heir duties, and establish regulations for ...t of persons who may receive appointments ... ...vil service.

5. ...ion 2 of the Civil Service Act of 1883, 22 Stat. 403, 5 U. S. C. § 633, provides, in part, as follows:

> It shall be the duty of said [civil service] commissioners:
>
> First. To aid the President, as he may request, in preparing suitable rules for carrying this section * * * into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect.
>
> Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows: * * *
>
> Fifth. No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.
>
> Sixth. No person in said service has any right to use his official authority or influence to coerce the political action of any person or body. * * *

6. Section 3 of the Act of August 24, 1937, 28 U. S. C. § 380a, provides, in part, as follows:

> No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge,

unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. * * *. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. * * *

III. REGULATIONS INVOLVED

1. Civil Service Rule I provides, in part, as follows:

1. *No interference with elections.*—No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinion on all political subjects, shall take no active part in political management or in political campaigns.

2. *No disclosure or discriminations.*—No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or

in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law.

3. *Prohibited Recommendations.*—No recommendation of an applicant, eligible, or employee in the classified service involving disclosure of his political or religious opinions or affiliations shall be considered or filed by the Civil Service Commission, hereinafter called the Commission, or by any officer concerned in making appointments or promotions.

2. Civil Service Rule XV provides:

Legal appointment necessary to compensation.—Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or Rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such Act, Rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1940

No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL., APPELLANTS

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTARY BRIEF FOR THE APPELLEES

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SUPPLEMENTARY BRIEF FOR THE APPELLEES

Prior to the Court's order of March 25, 1946, vacating the order of January 2, 1946, which set down the present case for reargument before the full bench, it had been the Government's intention to file a short supplementary brief upon reargument, dealing with certain questions which arose during the initial argument before the Court. In the belief that such a written discussion may still be helpful, it is herewith submitted by permission, in mimeographed form in order to avoid the delays of printing.

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I. THE LEGAL EFFECT OF APPELLEES' DETERMINATIONS IN POLITICAL ACTIVITY CASES INVOLVING FEDERAL EMPLOYEES

The question arose during oral argument whether the appellees as members of the Civil Service Commission can be said to have power to effect the dismissal of Federal employees for violation of the Hatch Act provision involved. This question breaks down into two questions: (1) Whether the Commission enforces this provision of the Hatch Act at all and (2) whether, if so, the Commission itself effects the dismissals which are occasioned by violations which it finds.

1. It has been conceded (Appellees' brief, n. 5 at p. 14) "that as to classified employees the Civil Service Commission does in practical effect enforce the challenged provision of § 9 (a) as well as the corresponding provision of Civil Service Rule I." This view is grounded upon the substantial identity of the Civil Service Rule which the Commission primarily enforces with the second sentence of Section 9 (a) of the Hatch Act, and upon the administrative practice, based upon an opinion of the Attorney General (40 Op. Atty. Gen. No. 2, at pp. 4–5), which has resulted in the application of the statutory "penalty" of removal, prescribed in Section 9 (b), as the mandatory and exclusive means of enforcing the Rule as well as the Act. Since the Act has both fixed the content of the Rule (see *infra*, p. 9) and im-

posed the requirement that violators be removed from office, and since employees who take an active part in political management and political campaigns violate "both the civil service rules and * * * the * * * Act" (40 Op. Atty. Gen. No. 2 at p. 5; see also par. 5 (b) of the Commission's regulations for enforcing the Rule, at R. 43), it seems correct to say that appellees enforce the Act by enforcing the Rule.

2. Whether appellees have power to bring about the dismissal of Federal employees violating the Act and the Rule turns upon the nature, intent, and consequence of their functions with respect to violators. Section 9 (b) of the Act (Appellees' brief, appendix, p. 53) requires that a violator "shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person." The responsibility for removing employees pursuant to this provision rests with the heads of the employing departments and agencies. 39 Op. Atty. Gen. at 447, 463–464; and see Appellees' brief, n. 5 at p. 14. The heads of the employing departments also take the final step of dismissing employees found by the Civil Service Commission to have violated Section 1 of Civil Service Rule I (and therefore also Section 9 (a) of the Hatch Act). Proceedings for the enforcement of Rule

I take place under Civil Service Rule XV (Appellees' brief, appendix, p. 59) which requires the Commission in proper cases to give "specific instructions as to * * * dismissal of the * * * employee affected" and, if these are not carried out, to take steps to stop the pay of the employee involved. See Appellees' brief, n. 5 at pp. 13–14. There can be no doubt that it is the purpose of Rule XV (and of the Hatch Act provision which has modified it by prescribing removal rather than lesser forms of discipline in political activity cases) to compel the dismissal of offending employees and not merely to stop their pay while leaving them in office.[1] Such is therefore the purpose and almost inevitable effect of the "specific instructions as to * * * dismissal" which the Commission issues under the Rule and which it states the appointing officer "must carry out at once" (*Federal Personnel Manual*, p. C2–6; see also R. 43).

For the foregoing reasons we think it is correct to state that the legal effect of the determinations of the Civil Service Commission which are pertinent here is to remove the employees in-

[1] Cf. the Government's similar contention with regard to the appropriation act provision involved in *United States* v. *Lovett et al.*, Nos. 809–811, this Term, certiorari granted March 25, 1946, which contains language less specific as to dismissal than Civil Service Rule XV. The Civil Service Rules are prescribed by the President pursuant to statute. See Appellees' brief, p. 23.

volved from office because of violations of the Act.

II. JURISDICTION TO GRANT THE RELIEF REQUESTED.

The contention of appellees in this case, having regard to the nature of the appellees' functions which have just been outlined, that the court below lacked jurisdiction to grant the relief requested, is not affected by the decision of this Court in *American Federation of Labor et al.* v. *Watson,* No. 448, this Term, decided March 25, 1946. That decision (see slip opinion, pp. 7–8, and p. 3 of the dissenting opinion of Mr. Chief Justice Stone) strengthens the point which has here been conceded *arguendo* (Appellees' brief, p. 14), that the interest of at least appellant Poole is sufficiently threatened by appellees to warrant equitable intervention if the matter is of equitable cognizance; but appellees' contention that the subject matter is not of equitable cognizance remains untouched. Moreover in *Macauley* v. *Waterman S. S. Corp.,* No. 435, this Term, also decided March 25, 1946, this Court added another authority to the cases (Appellees' brief, pp. 17–18) which hold that declaratory judgment proceedings are not available to challenge threatened official action under circumstances which would make it improper to entertain a suit for preventive relief (see p. 3, n. 4 of *Macauley* slip opinion). Appellees' challenge to the jurisdiction therefore stands.

III. THE SCOPE OF THE PROHIBITION IMPOSED BY THE SECOND SENTENCE OF SECTION 9 (A) OF THE HATCH ACT AS AFFECTED BY THE ENACTMENT OF SECTION 15

During the oral argument a question arose with regard to the precise effect upon the basic prohibition of Section 9 (a) (enacted August 2, 1939, 53 Stat. 1147, 1148; Appellees' brief, appendix p. 52), produced by the subsequent adoption of Section 15 (Act of July 19, 1940, § 4, 54 Stat. 767, 771; Appellees' brief, appendix, pp. 53–54). Section 15 reads as follows:

> The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

The enactment of Section 15 was accompanied by the adoption of an amendment to Section 9 (a) (§ 2 of the Act of July 19, 1940, 54 Stat. 767) which re-enacted the third sentence of that Section with an addition, making it read as follows:

> All such persons [i. e., officers and employees in the executive branch of the Federal Government] shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates.

It is clear from these two provisions that Congress at the same time (1) enacted into statute the previous determinations of the Civil Service Commission as to conduct constituting "active" participation "in political management or political campaigns" and (2) confirmed the right of Federal employees to full freedom of expression with regard to all political subjects and candidates. The Act of 1940 also added Section 18 (54 Stat. 772; Appellees' brief, pp. 35, 54) to the previous legislation, so as specifically to permit participation by Federal employees in elections and in campaigns not involving candidates or issues identified with national—or, as to issues, with state—political parties.[2]

The applicable Civil Service Rule (Section 1 of Rule I) read as follows on July 19, 1940 (R. 32, 74; Appellees' brief, p. 23):

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[2] The Act of 1940 also ratified specifically, by the addition of Section 18 to the Hatch Act (54 Stat. 771; Appellees' brief, pp. 35, 54), the practice previously authorized by executive order (see R. 95–99) of permitting Federal employees to participate actively in local political management or political campaigns in designated communities in the immediate vicinity of the National Capital (or elsewhere, under the Act, if a majority of the voters are employed by the Government).

> * * * Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.

Determinations of the Civil Service Commission as to conduct constituting prohibited political activity, made prior to July 19, 1940, are printed at pp. 80–87, 95–99 of the record (*cf.* Appellees' brief, p. 48). It seems clear that in so far as either the Civil Service Rule (by prohibiting other than private expressions of opinion) or the Commission in its specification of forbidden political activities went beyond the prohibition of active participation in political management or political campaigns, and in so far as the Act of 1940 explicitly conferred upon Federal employees the right to engage in specified activities, the enactment of Section 15 did not preserve the previous prohibitions or incorporate them into the statute.

Under a familiar rule of statutory construction, the specific provisions of the third sentence of Section 9 (a) securing to Federal employees the right to express opinions and of Section 18 securing the right to participate actively in nonpartisan elections and campaigns, prevail over the general provision of Section 15, enacted at the same time. Such has been the administrative

interpretation (40 Op. Atty. Gen., No. 2, p. 8; Appellees' brief, pp. 34–35); and the Civil Service Rule has accordingly been modified to conform substantially to Section 9 (a). (R. 39, 41, with which compare R. 74, 83; Appellees' brief, p. 23.) Similarly, any conflict between the previous prohibitions and Section 18 must be resolved in favor of the latter, notwithstanding Section 15. Thus, if the previous prohibition of certain activities in "primary and regular elections" (R. 83) were deemed to extend to referendum elections or elections to pass upon constitutional amendments, municipal ordinances, etc., that prohibition yields to Section 18; and so does the former prohibition of "activity in campaigns concerning the regulation or suppression of the liquor traffic" (R. 84). The latter prohibition has in fact disappeared, and the former has been clarified to bring it explicitly into accord with Section 18 (see R. 51).

Moreover, apart from the prevalence of the third sentence of Section 9 (a) and of Section 18 over Section 15, the latter section by its terms does not incorporate into Section 9 (a) any previous prohibitions which are not attributable to the proscription of acts constituting an "active part in political management or political campaigns". Thus, quite obviously, the former interdiction of "betting or wagering upon the results of primary and general elections" (R.

84) does not possess statutory force by virtue of Section 15; and the same may be said of the prohibition (R. 85) of initiating and circulating petitions addressed to state and local governments.[3]

Section 9 (a) of the Hatch Act since the amendments of 1940 as before, therefore, does not limit the acts and utterances of Federal employees in ways that are inconsistent with the rights which the Act specifically secures; and this interpretation accords with the legislative intent expressed on the floor of Congress during the consideration of the Act of 1940. See 86 Cong. Rec. 2623–2624, 2861, 2865, 2870–2871, 2872–2876, 2922–2924, 2928–2930, 2937–2940, 2942–2943, 2947–2954, 2957–2958, 2982–2983, 2985, 9371–9372.[4] It is of course necessary to draw the line between the public expression of "opinions on all political subjects and candidates", which the Act sanctions, and active participation in political campaigns, which it forbids. The one shades into the other, and in doubtful cases a decision must be made in the light of the particular circumstances; but the governing criteria, as we have previously in-

[3] Both prohibitions have been omitted from subsequent compilations of rules respecting forbidden activities. See R. 47–53 and, specifically, R. 51–52; see also the *Federal Personnel Manual*, pp. C2–8–C2–12.

[4] The most significant portions of the legislative history pertinent to this question are set forth in the opinion of the Attorney General referred to above, 40 Op. Atty. Gen. No. 2, at pp. 7–14.

sisted (Appellees' brief, pp. 18, 19–20, 23, 34–35), are to be found in the third as well as in the second sentence of Section 9 (a) and in Section 18 as well as Section 15. Compare *State of Oklahoma* v. *United States Civil Service Commission*, C. C. A. 10, January 18, 1946 (not yet reported).

Viewed in this light, the challenged provision of the Hatch Act emerges all the more clearly as a valid exercise of the legislative power with regard to governmental personnel.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 20.—October Term, 1946.

United Public Workers of America (C. I. O.), et al., Appellants, v. Harry B. Mitchell, Frances Perkins and Arthur S. Flemming.	Appeal from the District Court of the United States for the District of Columbia.

[February 10, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

The Hatch Act,* enacted in 1940, declares unlawful certain specified political activities of federal employees.[1] Section 9 forbids officers and employees in the executive branch of the Federal Government, with exceptions, from taking "any active part in political management or in political campaigns."[2] Section 15 declares that the activities theretofore determined by the United States Civil Service Commission to be prohibited to employees in the classified civil service of the United States by the civil

*Another controversy under the same act is decided today. *State of Oklahoma* v. *United States Civil Service Commission*, No. 84, October Term, 1946.

[1] August 2, 1939, 53 Stat. 1147; July 19, 1940, 54 Stat. 767; 56 Stat. 181, 986; 58 Stat. 136, 727; 59 Stat. 108, 658; 60 Stat., ch. 904, Pub. Law 684. Only the first two are important for consideration of this case.

[2] 18 U. S. C. § 61h:

"(a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political

service rules shall be deemed to be prohibited to federal employees covered by the Hatch Act.[3] These sections of the Act cover all federal officers and employees whether in the classified civil service or not and a penalty of dismissal from employment is imposed for violation. There is no designation of a single governmental agency for its enforcement.

For many years before the Hatch Act the Congress had authorized the exclusion of federal employees in the competitive classified service from active participation in political management and political campaigns.[4] In June, 1938,

campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term 'officer' or 'employee' shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

"(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such [illegible]n." 53 Stat. 1147, 1148; 54 Stat. 767; 56 Stat. 181.

[3] 18 U. S. C. § 61o:

"The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." 54 Stat. 767, 771.

[4] See Civil Service Act (1883), §2, 22 Stat. 403–404:

"SEC. 2. That it shall be the duty of said commissioners:

"FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall

the Congressional authorization for exclusion had been made more effective by a Civil Service Commission dis-

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have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

"SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

. . . . . .

"Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body."

5 U. S. C. § 631:

"The President is authorized to . . . establish regulations for the conduct of persons who may receive appointments in the civil service."

First Annual Report, Civil Service Commission, Ex. Doc. No. 105, 48th Cong., 1st Sess., p. 45:

"In the exercise of the power vested in the President by the Constitution, and by virtue of the 1753d section of the Revised Statutes, and of the civil service act approved January 16, 1883, the following rules for the regulation and improvement of the executive civil service are hereby amended and promulgated:

RULE I.

"No person in said service shall use his official authority or influence either to coerce the political action of any person or body or to interfere with any election."

Executive Order No. 642, June 3, 1907 (amended to consolidate without changing wording, Executive Order No. 655, June 15, 1907); Twenty-Fourth Annual Report, Civil Service Commission, House Doc. No. 600, 60th Cong., 1st Sess., p. 104:

"Section 1 of Rule I of the civil-service rules is hereby amended to read as follows:

"No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns."

ciplinary rule.[5] That power to discipline members of the competitive classified civil service continues in the Commission under the Hatch Act by virtue of the present applicability of the Executive Order No. 8705, March 5, 1941. The applicable Civil Service Commission rules are printed in the margin.[6] The only change in the Civil Service Rules relating to political activity, caused by the Hatch Act legislation, that is of significance in this case is the elimination on March 5, 1941, of the word "privately" from the phrase "to express privately their opinions." This limitation to private expression had regulated classified personnel since 1907.[7]

[5] Civil Service Rules 15, 3 Fed. Reg. 1525.

[6] 5 C. F. R., Cum. Supp., § 1.1: *"No interference with elections.* No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of the rules in this chapter are in the competitive classified service, while retaining the right to vote as they please and to express their opinion on all political subjects, shall take no active part in political management or in political campaigns."

Section 15.1 *"Legal appointment necessary to compensation.* Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or Rules, or of any Executive Order or any regulation of the Commission, or that any employee subject thereto has violated such Act, Rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers; and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing."

See E. O. 8705, March 5, 1941, 6 Fed. Reg. 1313.

[7] See note 4, *supra*, and 5 C. F. R. § 1.1, June 1, 1938.

A change occurred also in Rule 15. This was to comply with a ruling of the Attorney General that the Hatch Act made removal

The present appellants sought an injunction before a statutory three judge district court of the District of Columbia against appellees, members of the United States Civil Service Commission to prohibit them from enforcing against petitioners the provisions of the second sentence of § 9 (a) of the Hatch Act for the reason that the sentence is repugnant to the Constitution of the United States.[8] A declaratory judgment of the unconstitutionality of the sentence was also sought.[9] The sentence referred to reads, "No officer or employee in the executive branch of the Federal Government . . . shall take any active part in political management or in political campaigns."

Various individual employees of the federal executive civil service and the United Public Workers of America,[10] a labor union with these and other executive employees as members, as a representative of all its members, joined in the suit. It is alleged that the individuals desire to engage in acts of political management and in political campaigns. Their purposes are as stated in the excerpt from the complaint set out in the margin.[11] From the

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from office a mandatory penalty for forbidden political activity. 40 Op. A. G. 1. See note 5, *supra*, for Rule 15 prior to Hatch Act.

[8] See 28 U. S. C. § 380 (a); § 11-306 District of Columbia Code.

[9] Judicial Code § 274d; 28 U. S. C. § 400.

[10] No contention that appellant, United Public Workers of America. (C. I. O.), lacked capacity to bring this action is made by appellees. We need not consider the question here. *McCandless* v. *Furlaud*, 293 U. S. 67, 73–74. See *Fishgold* v. *Sullivan Drydock & Repair Corp.*, No. 970, October Term, 1945, decided May 27, 1946.

[11] "In discharge of their duties of citizenship, of their right to vote, and in exercise of their constitutional rights of freedom of speech, of the press, of assembly, and the right to engage in political activity, the individual plaintiffs desire to engage in the following acts: write for publication letters and articles in support of candidates for office; be connected editorially with publications which are identified with the legislative program of UFWA [former name of the present union appellant] and candidates who support it; solicit votes, aid in getting

affidavits it is plain, and we so assume, that these activities will be carried on completely outside of the hours of employment. Appellants challenge the second sentence of § 9 (a) as unconstitutional for various reasons. They are set out below in the language of the complaint.[12]

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out voters, act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; participate in and help in organizing political parades; initiate petitions, and canvass for the signatures of others on such petitions; serve as party ward committeeman or other party official; and perform any and all acts not prohibited by any provision of law other than the second sentence of Section 9 (a) and Section 15 of the Hatch Act, which constitute taking an active part in political management and political campaigns."

[12] "The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States as a deprivation of freedom of speech, of the press, and of assembly in violation of the First Amendment.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States as a deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States, since it unreasonably prohibits Federal employees from engaging in activities which may be lawfully carried on by persons who are not Federal employees, thus constituting a deprivation of liberty in violation of the Fifth Amendment.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States since it effects an arbitrary and grossly unreasonable discrimination between employees of the Federal Government in the classified civil service subject to its provisions and employees specifically exempted therefrom, in violation of the Fifth Amendment.

"The second sentence of Section 9 (a) of the Hatch Act is repugnant to the Constitution of the United States since it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law, in violation of the Fifth Amendment."

None of the appellants, except George P. Poole, has violated the provisions of the Hatch Act. They wish to act contrary to its provisions and those of § 1 of the Civil Service Rules and desire a declaration of the legally permissible limits of regulation. Defendants moved to dismiss the complaint for lack of a justiciable case or controversy. The District Court determined that each of these individual appellants had an interest in their claimed privilege of engaging in political activities, sufficient to give them a right to maintain this suit. *United Federal Workers of America (C. I. O.)* v. *Mitchell*, 56 Fed. Supp. 621, 624. The District Court further determined that the questioned provision of the Hatch Act was valid and that the complaint therefore failed to state a cause of action. It accordingly dismissed the complaint and granted summary judgment to defendants.

First. The judgment of the District Court was entered on September 26, 1944. An order was duly entered on October 26, 1944, allowing an appeal. 28 U. S. C. § 380a. The same section of the statutes provides: "In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts." This appeal was not docketed in this Court until February 2, 1945, a date after the return date of the order and § 380a. Thereafter the Government suggested a lack of jurisdiction in this Court to consider the appeal because of the failure of appellants to docket the appeal in time. We postponed consideration of our jurisdiction over this appeal to the hearing. We proceed now to a disposition of this question.

To comply with the suggestion of § 380a, this Court adopted Rule 47.[13] In other cases of appeals, Rule 11

[13] Rules of the Supreme Court of the United States, Rule 47:

"Appeals to this Court under the Act of August 24, 1937, shall be governed, as far as may be, by the rules of this court regulating the

governs docketing.[14] If Rule 11 applies also to appeals under § 380a, we may hear this appeal for the steps for dismissal required by Rule 11 were not taken by the appellee. This is because upon the allowance of an appeal by a judge of the district court as here, Supreme Court Rules 10 and 36, the case is transferred from the district court to this Court and subsequent steps for dismissal or affirmance are to be taken here.[15] If, however, the above quoted provision of § 380a as to docketing is a prerequisite to the power of this Court to review, this appeal must fail.

Prior to the passage of § 380a, appeals docketed after the return day were governed by Rule 11, 275 U. S., Appendix. In principle it has long been in existence.[16] By the words of the rule, it appears that dismissal for appellant's tardiness in docketing requires a step by the appel-

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procedure on appeal in other cases from courts of the United States; . . . The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."

[14] *Id.*, Rule 11: "1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court."

[15] Steps allowed in the district court after the allowance of appeal, such as preparation of the record, extension of time and cost or supersedeas bonds, are for convenience taken in the court possessed of the record. Rules 10, 11 and 36, Supreme Court; Rule 72, Rules of Civil Procedure.

[16] 3 Cranch 239; *Bingham* v. *Morris*, 7 Cranch 99; *Sparrow* v. *Strong*, 3 Wall. 97, 103. Compare *Grigsby* v. *Purcell*, 99 U. S. 505.

lee. Even after dismissal for failure to docket, the rule permits this Court to allow the appellant to docket. Nothing in the legislative history which has been called to our attention indicates that Congress intended its docketing provision to vary Rule 11. Direct appeal accomplishes the Congressional purpose of expediting review, of course, and is consistent with an unchanged practice as to dismissals. The time to docket may have been enlarged from the conventional return day of Rules 10 and 11 to bring continental uniformity, see Rule 10, or to give time for the preparation of a record which would often be large and not transcribed or printed. It will not expedite determination of constitutional questions to dismiss appeals because of errors of practice. In fact the sentence of § 380a on docketing seems deliberately to leave the practice on failure to docket to rules of court. We do not construe the requirement of docketing within sixty days as a limitation on our power to hear this appeal.

So far as our Rule 47 is concerned, we construe it as requiring in accordance with § 380a the docketing in sixty days from the allowance of the appeal, instead of the forty days of our Rule 10 and that as to dismissals, the first sentence of Rule 47 requires the same practice for appeals under § 380a that Rule 11 does for other appeals. We think it desirable to have sufficient flexibility in the rule to permit extensions of the time for return in the unusual situations that occur when large records are involved. In view of the recognized Congressional purpose to quicken review under § 380a, the discretion to delay final hearing allowed under Rule 11 will be exercised only on a definite showing of need therefor to assure fair review. This leads us to hear this appeal.[17]

Second. At the threshold of consideration, we are called upon to decide whether the complaint states a controversy

[17] Compare *Georgia Lumber Co.* v. *Compania*, 323 U. S. 334.

cognizable in this Court. We defer consideration of the cause of action of Mr. Poole until section *Three* of this opinion. The other individual employees have elaborated the grounds of their objection in individual affidavits for use in the hearing on the summary judgment. We select as an example one that contains the essential averments of all the others and print below the portions with significance in this suit.[18] Nothing similar to the fourth para-

[18] "At this time, when the fate of the entire world is in the balance, I believe it is not only proper but an obligation for all citizens to participate actively in the making of the vital political decisions on which the success of the war and the permanence of the peace to follow so largely depend. For the purpose of participating in the making of these decisions it is my earnest desire to engage actively in political management and political campaigns. I wish to engage in such activity upon my own time, as a private citizen.

"I wish to engage in such activities on behalf of those candidates for public office who I believe will best serve the needs of this country and with the object of persuading others of the correctness of my judgments and of electing the candidates of my choice. This objective I wish to pursue by all proper means such as engaging in discussion, by speeches to conventions, rallies and other assemblages, by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by 'ringing doorbells', by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor.

"I desire to engage in these activities freely, openly, and without concealment. However, I understand that the second sentence of Section 9 (a) of the Hatch Act and the Rules of the C. S. C. provide that if I engage in this activity, the Civil Service Commission will order that I be dismissed from federal employment. Such deprivation of my job in the federal government would be a source of immediate and serious financial loss and other injury to me.

"At the last Congressional election I was very much interested in the outcome of the campaign and offered to help the party of my choice by being a watcher at the polls. I obtained a watcher's certificate but I was advised that there might be some question of my right to use the certificate and retain my federal employment. Therefore, on November 1, 1943, the day before election, I called the regional

graph of the printed affidavit is contained in the other affidavits. The assumed controversy between affiant and the Civil Service Commission as to affiant's right to act as watcher at the polls on November 2, 1943, had long been moot when this complaint was filed. We do not therefore treat this allegation separately. The affidavits, it will be noticed, follow the generality of purpose expressed by the complaint. See note 11 *supra*. They declare a desire to act contrary to the rule against political activity but not that the rule has been violated. In this respect, we think they differ from the type of threat adjudicated in *Railway Mail Association* v. *Corsi*, 326 U. S. 88. In that case, the refusal to admit an applicant to membership in a labor union on account of race was involved. Admission had been refused. 326 U. S. at p. 93, note 10. Definite action had also been taken in *Hill* v. *Florida*, 325 U. S. 538. In the *Hill* case an injunction had been sought and allowed against Hill and the Union forbidding Hill from acting as the business agent of the union and the Union from further functioning as a union until it complied with the state law. The threats which menaced the affiants of these affidavits in the case now being considered are closer to a general threat by officials to enforce those laws which they are charged to administer, compare *Watson* v. *Buck*, 313 U. S. 387, 400, than they are to the direct threat of punishment against a named organization for a completed act that made the *Mail Association* and the *Hill* cases justiciable.

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office of the Civil Service Commission in Philadelphia and spoke to a person who gave his name as. . . . Mr. . . . stated that if I used my watcher's certificate, the Civil Service Commission would see that I was dismissed from my job at the . . . for violation of the Hatch Act. I, therefore, did not use the certificate as I had intended.

"I believe that Congress may not constitutionally abridge my right to engage in the political activities mentioned above. However, unless the courts prevent the Civil Service Commission from enforcing this unconstitutional law, I will be unable freely to exercise my rights as a citizen." [Identifying words omitted.]

As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.[19] For adjudication of constitutional issues "concrete legal issues, presented in actual cases, not abstractions are requisite."[20] This is as true of declaratory judgments as any other field.[21] These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution. As these appellants are classified employees, they have a right superior to the generality of citizens, compare *Fairchild* v. *Hughes*, 258 U. S. 126, but the facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy. Appellants want to engage in "political management and political campaigns," to persuade others to follow appellants' views by discussion, speeches, articles and other acts reasonably designed to secure the selection of appellants' political choices. Such generality of objection is really an attack on the political expediency of the Hatch Act, not the presentation of legal issues. It is beyond the competence of courts to render such a decision. *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162.

The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this

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[19] Correspondence & Public Papers of John Jay, Vol. 3, p. 486; *Hayburn's Case* and notes, 2 Dall. 409; *Alabama* v. *Arizona*, 291 U. S. 286, 291; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461.

[20] *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 423; *Alabama State Federation of Labor* v. *McAdory*, 323 U. S. 316, 324, and cases cited.

[21] *Altvater* v. *Freeman*, 319 U. S. 359, 363.

judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.[22]

The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judi-

[22] It has long been this Court's "considered practice not to decide abstract, hypothetical or contingent questions, or to decide any constitutional question in advance of the necessity for its decision, or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, or to decide any constitutional question except with reference to the particular facts to which it is to be applied, . . ." *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 461, and cases cited. See *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, No. 11, October Term, 1946, decided December 9, 1946.

cial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations. *Watson* v. *Buck, supra,* p. 400. We should not take judicial cognizance of the situation presented on the part of the appellants considered in this subdivision of the opinion. These reasons lead us to conclude that the determination of the trial court, that the individual appellants, other than Poole, could maintain this action, was erroneous.

Third. The appellant Poole does present by the complaint and affidavit matters appropriate for judicial determination.[23] The affidavits filed by appellees confirm that

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[23] "I have for a long time been interested in political activities. Both before and since my employment in the United States Mint, I have taken an active part in political campaigns and political management. In the 28th Ward, 7th Division in the City of Philadelphia I am and have been a Ward Executive Committeeman. In that position I have on many occasions taken an active part in political management and political campaigns. I have visited the residents of my Ward and solicited them to support my party and its candidates; I have acted as a watcher at the polls; I have contributed money to help pay its expenses; I have circulated campaign literature, placed banners and posters in public places, distributed leaflets, assisted in organizing political rallies and assemblies, and have done any and all acts which were asked of me in my capacity as a Ward Executive Committeeman. I have engaged in these activities both before and after my employment in the United States Mint. I intend to continue to engage in these activities on my own time as a private citizen, openly, freely, and without concealment.

"However, I have been served with a proposed order of the United States Civil Service Commission, dated January 12, 1944, which advises me that because of the political activities mentioned above, and for no other reason, 'it is, . . ., the opinion of this Commission that George P. Poole, an employee of the United States Mint at

Poole has been charged by the Commission with political activity and a proposed order for his removal from his position adopted subject to his right under Commission procedure to reply to the charges and to present further evidence in refutation.[34] We proceed to consider the controversy over constitutional power at issue between Poole and the Commission as defined by the charge and preliminary finding upon one side and the admissions of Poole's affidavit upon the other. Our determination is limited to those facts. This proceeding so limited meets the requirements of defined rights and a definite threat to interfere with a possessor of the menaced rights by a penalty for an act done in violation of the claimed restraint.[35]

Because we conclude hereinafter that the prohibition of § 9 of the Hatch Act and Civil Service Rule 1, see notes

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Philadelphia, Pennsylvania, has been guilty of political activity in violation of Section 1, Civil Service Rule I[1] and that unless I can refute the charges that I have engaged in political activity, I will be dismissed from my position as a Roller in the United States Mint at Philadelphia, Pennsylvania."

[34] The tentative charge and finding reads:

I.

"It is charged: That . . .

"The said George P. Poole held the political party office of Democratic Ward Executive Committeeman in the City of Philadelphia, Pennsylvania.

"The said George P. Poole was politically active by aiding and assisting the Democratic Party in the capacity of worker at the polls on general election day, November 5, 1940, and assisted in the distribution of funds in paying party workers for their services on general election day, November 5, 1940."

III.

"The above described activity constitutes taking an active part in political management and in a political campaign in contravention of Section 1, Civil Service Rule I, and the regulations adopted by the Commissioners thereunder."

[35] *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273; *Atwater* v. *Freeman*, 319 U. S. 359, 364; *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 260.

2 and 6 above, are valid, it is unnecessary to consider, as this is a declaratory judgment action, whether or not this appellant sufficiently alleges that an irreparable injury to him would result from his removal from his position.[26] Nor need we inquire whether or not a court of equity would enforce by injunction any judgment declaring rights.[27] Since Poole admits that he violated the rule against political activity and that removal from office is therefore mandatory under the act, there is no question as to the exhaustion of administrative remedies. The act provides no administrative or statutory review for the order of the Civil Service Commission. Compare *Stark* v. *Wickard*, 321 U. S. 288, 306–10; *Macauley* v. *Waterman S. S. Corporation*, 66 S. C. R. 712. As no prior proceeding, offering an effective remedy or otherwise, is pending in the courts, there is no problem of judicial discretion as to whether to take cognizance of this case. *Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491, 496–97, dissent at 500; *Larson* v. *General Motors Corporation*, 134 F. 2d 450, 453. Under such circumstances, we see no reason why a declaratory judgment action, even though constitutional issues are involved, does not lie. See Rules of Civil Procedure, Rule 57. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192, 197, 207; *Tunstall* v. *Brotherhood of*

[26] 28 U. S. C. § 400. "In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Aetna Life Insurance Co. v. *Haworth*, 300 U. S. 227, 241; *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264.

[27] See *White* v. *Berry*, 171 U. S. 366, 377; *In re Sawyer*, 124 U. S. 200, 212.

Locomotive Firemen & Enginemen, 323 U. S. 210, 212, *et seq.*[*]

Fourth. This brings us to consider the narrow but important point involved in Poole's situation.[**] Poole's stated offense is taking an "active part in political management or in political campaigns." He was a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and a paymaster for the services of other party workers. The issue for decision and the only one we decide is whether such a breach of the Hatch Act and Rule 1 of the Commission can, without violating the Constitution, be made the basis for disciplinary action.

When the issue is thus narrowed, the interference with free expression is seen in better proportion as compared with the requirements of orderly management of administrative personnel. Only while the employee is politically active, in the sense of Rule 1, must he withhold expression of opinion on public subjects. See note 6. We assume that Mr. Poole would be expected to comment publicly as committeeman on political matters, so that indirectly there is an attenuated interference. We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we

[*] In *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, a declaratory judgment proceeding, p. 46, prior to the adoption of Rule 57, a proceeding before the N. L. R. B. was required. There is statutory judicial review from that Board's decisions, however.

[**] We agree with the Government that the complaint does not fail to state a cause of action against the Commission because it seeks relief against the Commission's action under the Hatch Act instead of Rule 1 of the Commission. So far as Poole's controversy is concerned, the act and the rule are the same.

have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment. Appellants' objections under the Amendments are basically the same.

We do not find persuasion in appellants' argument that such activities during free time are not subject to regulation even though admittedly political activities cannot be indulged in during working hours.[29] The influence of political activity by government employees, if evil in its effects on the service, the employees or people dealing with them, is hardly less so because that activity takes place after hours. Of course, the question of the need for this regulation is for other branches of government rather than the courts. Our duty in this case ends if the Hatch Act provision under examination is constitutional.

Of course, it is accepted constitutional doctrine that these fundamental human rights are not absolutes. The requirements of residence and age must be met. The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.[30] The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. There-

[29] In labor-management relationships, it has been recognized by this Court that circumstances might justify the prohibition by employers of union activity by employees on the employer's property, even though carried out during non-working hours. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 803.

[30] *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571; *Cantwell* v. *Connecticut*, 310 U. S. 296, 304, 310; *Schneider* v. *State*, 308 U. S. 147, 165; *DeJonge* v. *Oregon*, 299 U. S. 353, 364; *Cox* v. *New Hampshire*, 312 U. S. 569, 574; *Prince* v. *Massachusetts*, 321 U. S. 158, 169; *Reynolds* v. *United States*, 98 U. S. 145.

fore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail. Again this Court must balance the extent of the guarantees of freedom against a congressional enactment to protect a democratic society against the supposed evil of political partisanship by classified employees of government.

As pointed out hereinbefore in this opinion, the practice of excluding classified employees from party offices and personal political activity at the polls has been in effect for several decades. Some incidents similar to those that are under examination here have been before this Court and the prohibition against certain types of political activity by office holders has been upheld. The leading case was decided in 1882. *Ex parte Curtis*, 106 U. S. 371. There a subordinate United States employee was indicted for violation of an act that forbade employees who were not appointed by the President and confirmed by the Senate from giving or receiving money for political purposes from or to other employees of the government on penalty of discharge and criminal punishment. Curtis urged that the statute was unconstitutional. This Court upheld the right of Congress to punish the infraction of this law. The decisive principle was the power of Congress, within reasonable limits, to regulate, so far as it might deem necessary, the political conduct of its employees. A list of prohibitions against acts by public officials that are permitted to other citizens was given. This Court said, p. 373:

> "The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service.

> Clearly such a purpose is within the just scope of legislative power, and it is not easy to see why the act now under consideration does not come fairly within the legitimate means to such an end."

The right to contribute money through fellow employees to advance the contributor's political theories was held not to be protected by any Constitutional provision. It was held subject to regulation. A dissent by Mr. Justice Bradley emphasized the broad basis of the Court's opinion. He contended that a citizen's right to promote his political views could not be so restricted merely because he was an official of government.[21]

No other member of the Court joined in this dissent. The conclusion of the Court, that there was no constitutional bar to regulation of such financial contributions of public servants as distinguished from the exercise of political privileges such as the ballot, has found acceptance in the subsequent practice of Congress and the growth of the principle of required political neutrality for classified public servants as a sound element for efficiency.[22] The con-

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[21] 106 U. S. 376–77: ". . . every citizen having the proper qualifications has the right to accept office, and to be a candidate therefor. This is a fundamental right of which the legislature cannot deprive the citizen, nor clog its exercise with conditions that are repugnant to his other fundamental rights. Such a condition I regard that imposed by the law in question to be. It prevents the citizen from co-operating with other citizens of his own choice in the promotion of his political views. . . . The whole thing seems to be absurd. Neither men's mouths nor their purses can be constitutionally tied up in that way."

[22] Kaplan, Political Neutrality of the Civil Service, 1 Pub. Pers. Rev. 10; White, Civil Service in the Modern State (1930); Mosher and Kingsley, Public Personnel Administration (1936); White, Government Career Service (1935); Meriam, Public Personnel Problems (1938).

Military personnel is restricted in much the same manner. Army Regulations No. 600–10, p. 5: "6. Political activities of persons in

viction that an actively partisan governmental personnel threatens good administration has deepened since *Ex parte Curtis*. Congress recognizes danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections.[33]

In *United States* v. *Wurzbach*, 280 U. S. 396, the doctrine of legislative power over actions of governmental officials was held valid when extended to members of Congress. The members of Congress were prohibited from receiving contributions for "any political purpose whatever" from any other federal employees. Private citizens were not affected. The argument of unconstitutionality because of interference with the political rights of a citizen by that time was dismissed in a sentence. Compare *United States* v. *Thayer*, 209 U. S. 39.

The provisions of § 9 of the Hatch Act and the Civil Service Rule 1 are not dissimilar in purpose from the statutes against political contributions of money. The prohibitions now under discussion are directed at political contributions of energy by Government employees. These contributions, too, have a long background of dis-

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military service.—*a. General.*—No member of the Army, while on active duty, will use his official authority or influence for the purpose of interfering with an election or affecting the course or outcome thereof. Such persons, while on active duty, retain the right to vote, to express their opinions privately and informally on all political subjects and candidates, and to become candidates for public office as permitted in these regulations. They will not be permitted to participate in any way in political management or political campaigns."

An interesting discussion of the general subject of interference by federal officers in elections will be found in the Appendix to the Congressional Globe, Dec. 3, 1838–Feb. 19, 1839, pp. 157, 160 and 409, 411.

[33] 86 Cong. Rec. 2338–2367, 2426–2442, 2696–2723, 2920–2963, 2969–2987, 9360–9380, 9426–9432, 9434–9463.

approval.[24] Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.[25]

Another Congress may determine that on the whole, limitations on active political management by federal personnel are unwise. The teaching of experience has evidently led Congress to enact the Hatch Act provisions. To declare that the present supposed evils of political activity are beyond the power of Congress to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system. Congress is not politically naive or regardless of public welfare or that of the employees. It leaves untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency. With that limitation only, employees may make their contributions to public affairs or protect their own interests, as before the passage of the act.

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[24] Richardson, Messages and Papers of the Presidents (1897), Harrison, vol. IV, p. 52; *id.*, Hayes, vol. VII, pp. 450–51. See note 4, *supra*.

When in 1891 New Bedford, Mass., under a rule removed a policeman for political activity, an opinion by Mr. Justice, then Judge, Holmes disposed summarily of McAuliffe's contention that the rule invaded his right to express his political opinion with the epigram, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220.

[25] Several states have similar provisions. Ala. Code (1940), tit. 12, § 157; Conn. Gen. Stat. (Supp. 1939), c. 105a § 698e; Ohio Gen. Code (Page, 1937), § 486-23; Pa. Stat. Ann. (Purdon, 1942), Tit. 71, § 741.904; R. I. Acts & Resolves, 1939, p. 118.

The argument that political neutrality is not indispensable to a merit system for federal employees may be accepted. But because it is not indispensable does not mean that it is not desirable or permissible. Modern American politics involves organized political parties. Many classifications of Government employees have been accustomed to work in politics—national, state and local—as a matter of principle or to assure their tenure. Congress may reasonably desire to limit party activity of federal employees so as to avoid a tendency toward a one-party system. It may have considered that parties would be more truly devoted to the public welfare if public servants were not over active politically.

Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not "enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work." None would deny such limitations on Congressional power but because there are some limitations it does not follow that a prohibition against acting as ward leader or worker at the polls is invalid. A reading of the Act and Rule 1, notes 2 and 6, *supra*, together with the Commission's determination [46] shows the wide range of public activities with which there is no interference by the legislation. It is only partisan political activity that is interdicted. It is active participation in political management and political campaigns. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the Government employee does not direct his activities toward party success.

[46] United States Civil Service Commission, Political Activity and Political Assessments, Form 1236, January 1944.

It is urged, however, that Congress has gone further than necessary in prohibiting political activity to all types of classified employees. It is pointed out by appellants "that the impartiality of many of these is a matter of complete indifference to the effective performance" of their duties.[37] Mr. Poole would appear to be a good illustration for appellants' argument. The complaint states that he is a roller in the Mint. We take it this is a job calling for the qualities of a skilled mechanic and that it does not involve contact with the public. Nevertheless, if in free time he is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement or preferment with his superiors. Congress may have thought that Government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service. There are hundreds of thousands of United States employees with positions no more influential upon policy determination than that of Mr. Poole. Evidently what Congress feared was the cumulative effect on employee morale of political activity by all employees who could be induced to participate actively. It does not seem to us an unconstitutional basis for legislation.

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[37] "In the light of these wide variations in duties and responsibility for public policy and its fair enforcement, a restriction reasonably designed to preserve the impartiality of a Collector of the Revenue, a U. S. Marshal, an F. B. I. or Treasury agent may be utterly absurd and unjustified when applied to a lens grinder, a stock clerk, a machinist, or an elevator operator. It is therefore impossible both to observe reasonable regard for constitutional rights and to enact sweeping prohibitions as to political rights applicable to all Federal employees whatever the nature of their duties. In dealing with so complicated and varied a subject matter, a hatchet cannot readily be substituted for a scalpel."

There is a suggestion that administrative workers may be barred, constitutionally, from political management and political campaigns while the industrial workers may not be barred, constitutionally, without an act "narrowly drawn to define and punish specific conduct." A ready answer, it seems to us, lies in the fact that the prohibition of § 9 (a) of the Hatch Act "applies without discrimination to all employees whether industrial or administrative" and that the Civil Service Rules, by § 15 made a part of the Hatch Act, makes clear that industrial workers are covered in the prohibition against political activity. Congress has determined that the presence of government employees, whether industrial or administrative, in the ranks of political party workers is bad. Whatever differences there may be between administrative employees of the Government and industrial workers in its employ are differences in detail so far as the constitutional power under review is concerned. Whether there are such differences and what weight to attach to them, are all matters of detail for Congress. We do not know whether the number of federal employees will expand or contract; whether the need for regulation of their political activities will increase or diminish. The use of the constitutional power of regulation is for Congress, not for the courts.

We have said that Congress may regulate the political conduct of Government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such interference passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions. The regulation of such activities as Poole carried on has

the approval of long practice by the Commission, court decisions upon similar problems and a large body of informed public opinion. Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. We cannot say with such a background that these restrictions are unconstitutional.

Section 15 of the Hatch Act, note 3 above, defines an active part in political management or political campaigns as the same activities that the Unted States Civil Service Commission has determined to be prohibited to classified civil service employees by the provisions of the Civil Service rules when § 15 took effect July 19, 1940. 54 Stat. 767. The activities of Mr. Poole, as ward executive committeeman and a worker at the polls, obviously fall within the prohibitions of § 9 of the Hatch Act against taking an active part in political management and political campaigns. They are also covered by the prior determinations of the Commission.[38] We need to examine no fur-

[38] United States Civil Service Commission, Political Activity and Political Assessments, Form 1236, September 1939:

"15. Committees.—Service on or for any political committee or similar organization is prohibited. . . .

"20. Activity at the polls and for candidates.— . . .

"It is the duty of an employee to avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, assisting in counting the vote, or engaging in any other activity at the polls except the marking and depositing of his own ballot."

ther at this time into the validity of the definition of political activity and § 15.[29]

The judgment of the District Court is accordingly

Affirmed.

MR. JUSTICE MURPHY and MR. JUSTICE JACKSON took no part in the consideration or decision of this case.

MR. JUSTICE RUTLEDGE dissents as to Poole for the reasons stated by MR. JUSTICE BLACK. He does not pass upon the constitutional questions presented by the other appellants for the reason that he feels the controversy as to them is not yet appropriate for the discretionary exercise of declaratory judgment jurisdiction.

[29] *United States* v. *Wurzbach*, 280 U. S. 396, 399.

SUPREME COURT OF THE UNITED STATES

No. 20.—October Term, 1946.

United Federal Workers of America (C. I. O.), et al., Appellants, v. Harry B. Mitchell, et al.	On Appeal from the District Court of the United States for the District of Columbia.

[February 10, 1947.]

Mr. Justice Frankfurter, concurring.

The terms of the Act of August 24, 1937, 50 Stat. 751, 752, 28 U. S. C. § 380a, in the light of its history, have convinced me that this case should be dismissed for want of jurisdiction.

In that Act, Congress put a limit to the time within which a case may be docketed here after an appeal below is allowed. Such a limitation by Congress is in the exercise of its power to regulate the appellate jurisdiction of this Court. It is not within our power to enlarge a limit fixed by Congress unless Congress itself gave the Court such dispensing power.

In allowing a direct appeal to this Court from a district court "under such rules as may be prescribed," Congress did not mean to give this Court power to defeat the considerations of speed in the disposition of controversies involving the constitutionality of federal legislation which led to the specific provision that a case be docketed "within sixty days from the time such appeal is allowed". No rule of this Court could disregard the limitations for perfecting an appeal made by Congress. Nor does Rule 47, which was the rule responsive to the Act of August 24, 1937, purport to do so. It merely reasserts the statutory requirement that in a case like this "The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed." The introduc-

affects the participation in political campaigns of many thousands of state employees.[3] No one of all these millions of citizens can, without violating this law, "take any active part" in any campaign for a cause or for a candidate if the cause or candidate is "specifically identified with any National or State political party." Since under our common political practices most causes and candidates are espoused by political parties, the result is that, because they are paid out of the public treasury, all these citizens who engage in public work can take no really effective part in campaigns that may bring about changes in their lives, their fortunes, and their happiness.[4]

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[3] All state employees who work for any state agency financed in whole or in part by federal grants or loans are affected by the Act. Section 12a; 18 U. S. C. 61*l*.

In 1945 the Federal Government paid $865,729,569.15 in grants in aid to states, *Annual Report of the Secretary of the Treasury on the State of the Finances, for the fiscal year ending June 30, 1945* (1946) 714, and $688,506,157.11 in direct payments to states for the social security program, public roads and emergency maternity and infant care. *Id.* at 718. Grants to and expenditures within states, providing direct relief, work relief, and other aid such as the Agricultural Adjustment Program, National Housing Agency annual contributions, etc., totaled $1,353,427,735.68. *Id.* at 721.

In July 1946 the number of persons employed by state and local governments totaled approximately 2,824,000 of whom 654,000 were employed in schools and 2,170,000 were non-school employees. *Public Employment in July, 1946, Government Employment*, Dept. of Commerce, Bureau of the Census, Vol. 7, No. 3 (1946) 1. A breakdown of county employees is a sample which suggests the proportion state and local whose salaries may be paid in whole or in part by federal funds thus coming under the provisions of this Act. Of a total of 310,000 non-school county employees in the entire country, 77,000 were employed in highway departments; 4,700 in natural resources; 12,600 in health and sanitation; 40,000 in hospitals; 22,000 in public welfare. *County Employment in 1944, Government Employment, op. cit. supra*, Vol. 5, No. 2 (1944) 7.

[4] There are minor exceptions. One concession only is granted those federal employees who live "in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities

We are not left in doubt as to how numerous and varied are the "activities" prohibited. For § 15 sweepingly describes them as "the same activities . . . as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States. . . ." Along with the vague and uncertain prior prohibitions of the Commission, are these things which the Commission had clearly prohibited: serving as an election officer; publicly expressing political views at a party caucus or political gathering for or against any candidate or cause identified with a party; soliciting votes for a party or candidate; participating in a political parade; writing for publication or publishing any letter or article, signed or unsigned, in favor of or against any political party, candidate, or faction; initiating, or canvassing for signatures on, community petitions or petitions to Congress.

In view of these prohibitions, it is little consolation to employees that the Act contradictorily says that they may "express their opinions on all political subjects and

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the majority of whose voters are employed by the Government of the United States. . . ." The Civil Service Commission may "permit" them to participate in campaigns involving the "municipality or political subdivision" in which they reside "to the extent the Commission deems to be in [their] domestic interest. . . ." Section 16; 18 U. S. C. 61*p*. A general exception permits participation (1) in an "election and the preceding campaign if none of the candidates is to be nominated or elected . . . as representing a (political) party . . .; (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed specifically identified with any State or National party." § 18, 18 U. S. C. § 61*r*. The importance and number of political issues thus excepted, *e. g.* Sunday movies, local school bond issues, location of local parks, election of local officials in whom no political party is interested, are obviously very small.

candidates." For this permission to "express their opinions," is, the Commission has rightly said, "subject to the prohibition that employees may not take any active part in . . . political campaigns." The hopeless contradiction between this privilege of an employee to talk and the prohibition against his talking stands out in the Commission's further warning to all employees that they can express their opinions publicly, but "Public expression of opinion in such way as to constitute taking an active part in political management or in political campaigns is accordingly prohibited." Thus, whatever opinions employees may dare to express, even secretly, must be at their peril. They cannot know what particular expressions may be reported to the Commission and held by it to be a sufficient political activity to cost them their jobs. Their peril is all the greater because of another warning by the Commission that "Employees are . . . accountable for political activity by persons other than themselves, including wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly." Thus are the families of public employees stripped of their freedom of political action. The result is that the sum of political privilege left to government and state employees, and their families, to take part in political campaigns seems to be this: They may vote in silence; they may carefully and quietly express a political view at their peril; and they may become "spectators" (this is the Commission's word) at campaign gatherings, though it may be highly dangerous for them to "second a motion" or let it be known that they agree or disagree with a speaker.

All of the petitioners here challenge the constitutional validity of that sentence of § 9 of the statute which prohibits all federal employees from taking "any active part in political management or in political campaigns" and

which by reference only sweeps under this prohibition all then-existing civil service regulations. The charge is that this provision, thus supplemented by the regulations, violates the First Amendment by prohibiting freedom of press, speech, and assembly; that it violates the Fifth Amendment because it effects an arbitrary and gross discrimination between government employees covered and those exempted; that it also violates the Fifth Amendment because it is so vague and indefinite as to prohibit lawful activities as well as activities which are properly made unlawful by other provisions of law. Thus, these attacks of Poole and all the other petitioners are identical, namely, that the provision is unconstitutional on its face. The Court decides this question against Poole after holding that his case presents a justiciable controversy. I think Poole's challenge to the constitutionality of the provision should be sustained. And since I agree with MR. JUSTICE DOUGLAS that all the petitioners' complaints state a case or controversy, and show threats of imminent irreparable damages, I think that the contention that the challenged provision is unconstitutional on its face should be sustained as to all of them.

Had this measure deprived five million farmers, or a million businessmen of all right to participate in elections, because Congress thought that federal farm or business subsidies might prompt some of them to exercise, or be susceptible to, a corrupting influence on politics or government, I would not sustain such an Act on the ground that it could be interpreted so as to apply only to some of them. Certainly laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public.[4] Furthermore, what federal employees can or cannot do, consistently

[4] *Thornhill* v. *Alabama*, 310 U. S. 88; *Matsh* v. *Alabama*, 327 U. S. 501; *Bridges* v. *California*, 314 U. S. 252, 260, 263.

with the various civil service regulations, rules, warnings, etc., is a matter of so great uncertainty that no person can even make an intelligent guess. This was demonstrated by the government's briefs and oral arguments in this case. I would hold that the provision here attacked is too broad, ambiguous, and uncertain in its consequences to be made the basis of removing deserving employees from their jobs. See dissenting opinion, *Williams* v. *North Carolina*, 325 U. S. 226, 261, 276–278 and cases collected, note 16.

The right to vote and privately to express an opinion on political matters, important though they be, are but parts of the broad freedoms which our Constitution has provided as the bulwark of our free political institutions. Popular government, to be effective, must permit and encourage much wider political activity by all the people.[6] Real popular government means "that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion. . . . Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth." *Thornhill* v. *Alabama*, 310 U. S. 88, 95. Legislation which muzzles several million citizens threatens popular government, not only because it injures the individuals muzzled, but also, because of its harmful effect on the body politic in depriving it of the political participation and interest of such a large segment of our citizens. Forcing public employees to contribute money and influence can well be proscribed in the interest of "clean politics" and public administration. But I think the Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints, and suggestions to the political debates which are

[6] Some states require that employers pay their employees for the time they spend away from work while voting. See *People* v. *Ford Motor Co.*, 271 App. Div. 141, 63 N. Y. S. 2d 697; Note, *Pay While Voting*, 47 Col. L. Rev. 135 (1947).

the essence of our democracy; prevents them from engaging in organizational activity to urge others to vote and take an interest in political affairs; bars them from performing the interested citizen's duty of insuring that his and his fellow citizens' votes are counted. Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly, and petition. And it would violate, or come dangerously close to violating, Article I and the Seventeenth Amendment of the Constitution, which protect the right of the people to vote for their Congressmen and their United States Senators and to have their votes counted. See *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Mosly*, 238 U. S. 383; *United States* v. *Classic*, 313 U. S. 299, 314.

There is nothing about federal and state employees as a class which justifies depriving them or society of the benefits of their participation in public affairs. They, like other citizens, pay taxes and serve their country in peace and in war. The taxes they pay and the wars in which they fight are determined by the elected spokesmen of all the people. They come from the same homes, communities, schools, churches, and colleges as do the other citizens. I think the Constitution guarantees to them the same right that other groups of good citizens have to engage in activities which decide who their elected representatives shall be.

No statute of Congress has ever before attempted so drastically to stifle the spoken and written political utterances and lawful political activities of federal and state employees as a class. The nearest approach was the Civil Service Act of 1883, 22 Stat. 403–4, which authorized the President to promulgate rules so that among other things no Government employee should "use his official authority or influence to coerce the political action of any person or body." In 1907, the Civil Service Commission, purporting to act under authority of the 1883 Act, did, as the Court

points out, prohibit civil service employees from taking "an active part in political management or in political campaigns." But this Court has not approved the statutory power of the Commission to promulgate such a rule, nor has it ever expressly or by implication approved the constitutional validity of any such sweeping abridgement of the right of freedom of expression. Neither *Ex parte Curtis*, 106 U. S. 371, nor *United States* v. *Wurzbach*, 280 U. S. 396, lend the slightest support to the present statute. Both of these cases related to statutes which did no more than limit the right of employees to collect money from other employees for political purposes. Indeed, the *Curtis* decision seems implicitly to have rested on the assumption that many political activities of Government employees, beyond merely voting and speaking secretly, would not, and could not under the Constitution, be impaired by the legislation there at issue. *Ex parte Curtis*, *supra* at 375.

It is argued that it is in the interest of clean politics to suppress political activities of federal and state employees. It would hardly seem to be imperative to muzzle millions of citizens because some of them, if left their constitutional freedoms, might corrupt the political process. All political corruption is not traceable to state and federal employees. Therefore, it is possible that other groups may later be compelled to sacrifice their right to participate in political activities for the protection of the purity of the Government of which they are a part.

It may be true, as contended, that some higher employees, unless restrained, might coerce their subordinates or that Government employees might use their official position to coerce other citizens. But is such a possibility of coercion of a subordinate by his employer limited to governmental employer-employee relationships? [7] The same

[7] Many states have laws protecting non-government employees from employer interference with their voting independence. See Note, *Pay While Voting*, 47 Col. L. Rev. 135, 136, note 9 (1947).

quality of argument would support a law to suppress the political freedom of all employees of private employers, and particularly of employers who borrow money or draw subsidies from the Government. Nor does it seem plausible that all of the millions of public employees whose rights to free expression are here stifled, might, if they participate in elections, coerce other citizens not employed by the Government or the States. Poole, one of the petitioners here, is a roller in a government printing office. His job is about on a par in terms of political influence with that of most other state, federal, and private business employees. Such jobs generally do not give such employees who hold them sufficient authority to enable them to wield a dangerous or coercive influence on the political world. If the possibility exists that some other public employees may, by reason of their more influential positions, coerce other public employees or other citizens, laws can be drawn to punish the coercers.[8] It hardly seems consistent with our system of equal justice to all to suppress the political and speaking freedom of millions of good citizens because a few bad citizens might engage in coercion.[9]

It may also be true, as contended, that if public employees are permitted to exercise a full freedom to express their views in political campaigns, some public officials will discharge some employees and grant promotion to others on a political rather than on a merit basis. For the same reasons other public officials, occupying positions of influence, may use their influence to have their own political supporters appointed or promoted. But here again, if the practice of making discharges, promotions or recommendations for promotions on a political basis is so great an evil as to require legislation, the law could punish those public officials who engage in the practice.

[8] See note 7, *supra*.

[9] The Act, in fact, leaves free the higher officials whose positions give them the actual power to coerce subordinates and other citizens not employed by the government. § 9a; 18 U. S. C. 61h.

To punish millions of employees and to deprive the nation of their contribution to public affairs, in order to remove temptation from a proportionately small number of public officials, seems at the least to be a novel method of suppressing what is thought to be an evil practice.

Our political system, different from many others, rests on the foundation of a belief in rule by the people—not some, but all the people. Education has been fostered better to fit people for self-expression and good citizenship. In a country whose people elect their leaders and decide great public issues, the voice of none should be suppressed—at least such is the assumption of the First Amendment. That Amendment, unless I misunderstand its meaning, includes a command that the Government must, in order to promote its own interest, leave the people at liberty to speak their own thoughts about government, advocate their own favored governmental causes, and work for their own political candidates and parties.

The section of the Act here held valid reduces the constitutionally protected liberty of several million citizens to less than a shadow of its substance. It relegates millions of federal, state, and municipal employees to the role of mere spectators of events upon which hinge the safety and welfare of all the people, including public employees. It removes a sizable proportion of our electorate from full participation in affairs destined to mould the fortunes of the Nation. It makes honest participation in essential political activities an offense punishable by proscription from public employment. It endows a governmental board with the awesome power to censor the thoughts, expressions, and activities of law-abiding citizens in the field of free expression from which no person should be barred by a government which boasts that it is a government of, for, and by the people—all the people. Laudable as its purpose may be, it seems to me to hack at the roots of a Government by the people themselves; and consequently I cannot agree to sustain its validity.

SUPREME COURT OF THE UNITED STATES

No. 20.—October Term, 1946.

United Public Workers of America (C. I. O.), et al., Appellants, v. Harry B. Mitchell, Frances Perkins and Arthur S. Flemming.	On Appeal from the District Court of the United States for the District of Columbia.

[February 10, 1947.]

Mr. Justice Douglas, dissenting in part.

I disagree with the Court on two of the four matters decided.

First. There are twelve individual appellants here asking for an adjudication of their rights.[1] The Court passes on the claim of only one of them, Poole. It declines to pass on the claims of the other eleven on the ground that they do not present justiciable cases or controversies. With this conclusion I cannot agree.

It is clear that the declaratory judgment procedure is available in the federal courts only in cases involving actual controversies and may not be used to obtain an advisory opinion in a controversy not yet arisen. *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324–325, and cases cited. The requirement of an "actual controversy",

[1] Elkin, Senior Economic Statistician, Railroad Retirement Board; Abelson, Associate Financial Analyst, Social Security Board; Phillips, Labor Economist, War Shipping Administration; Mitchell, Wage Analyst, National War Labor Board; Fagan, Area Director, War Manpower Commission; Winegar, Senior Officer, Bureau of Prisons; Hindin, Procedural Assistant, Federal Security Agency; Rieck, Stock Clerk, Veterans Administration; Poole, Roller, United States Mint; Shane, Lens Grinder, Frankford Arsenal; Weber, Machinist Specialist, Frankford Arsenal; Tempest, Electric Welder, Philadelphia Navy Yard.

which is written into the statute (Judicial Code § 274d, 28 U. S. C. § 400) and has its roots in the Constitution (Article III, § 2) seems to me to be fully met here.

What these appellants propose to do is plain enough. If they do what they propose to do, it is clear that they will be discharged from their positions. The analysis of the situation by the District Court seems to me to be accurate and conclusive:

> "The mere existence of the statute, saying that they shall not engage in political activity, the penalty in the statute that they shall be dismissed if they do, and the warning addressed to them by the Civil Service Commission in their posters certainly prevent them from engaging in such activity, if the statute is constitutional. If the statute is unconstitutional, they are being prevented from things which they have the right to do. If the statute is constitutional, it is mandatory that they be dismissed for doing such things . . . The provisions of Civil Service Rule XV that in case of any violation of the Civil Service Act or Rules or of any Executive Order or any regulation of the Commission the Commission shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal is now controlled by the provisions of the Hatch Act that in case of violation of Section 9 (a) of that Act, dismissal is mandatory." 56 F. Supp. 621, 624.

Their proposed conduct is sufficiently specific to show plainly that it will violate the Act. The policy of the Commission and the mandate of the Act leave no lingering doubt as to the consequences.[2]

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[2] The case is, therefore, unlike those situations where the Court refused to entertain actions for declaratory judgments, the state of facts being hypothetical in the sense that the challenge was to statutes which had not as yet been construed or their specific application known. See *Electric Bond & S. Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450.

On a discharge these employees would lose their jobs, their seniority, and other civil service benefits. They could, of course, sue in the Court of Claims. *United States* v. *Lovett*, 328 U. S. 303. But the remedy there is a money judgment, not a restoration to the office formerly held. Of course, there might be other remedies available in these situations to determine their rights to the offices from which they are discharged. See *White* v. *Berry*, 171 U. S. 366, 377. But to require these employees first to suffer the hardship of a discharge is not only to make them incur a penalty; it makes inadequate, if not wholly illusory, any legal remedy which they may have.[3] Men who must sacrifice their means of livelihood in order to test their rights to their jobs must either pursue prolonged and expensive litigation as unemployed persons or pull up their roots, change their life careers, and seek employment in other fields. At least to the average person in the lower income groups the burden of taking that course is irreparable injury,[4] cf. *Ex parte Young*, 209 U. S. 123, 165, no matter how exact the required showing. Cf. *Watson* v. *Buck*, 313 U. S. 387, 400.

The declaratory judgment procedure may not, of course, be used as a substitute for other equitable remedies to defeat a legislative policy, *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 300–301, or to circumvent the necessity of exhausting administrative remedies. *Order of Conduc-*

[3] Where the legal remedy is adequate, it may be the more appropriate one. Thus in *Coffman* v. *Breeze Corporations*, *supra*, declaratory relief was denied a licensor of a patent who sued his licensee for an adjudication that the Royalty Adjustment Act was unconstitutional since it appeared that a suit to recover royalties was an adequate legal remedy and that the constitutional issues could be litigated there.

[4] If the prayer for declaratory relief be considered separately from the prayer for an injunction, as it may be, allegations of irreparable injury threatened are not required. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241.

tors v. *Penn. R. Co.*, 323 U. S. 166; *Macauley* v. *Waterman S. S. Corp.*, 327 U. S. 540. But it fills a need and serves a high function previously "performed rather clumsily by our equitable proceedings and inadequately by the law courts." H. R. No. 1264, 73d Cong., 2d Sess., p. 2.[5]

The declaratory judgment procedure is designed "to declare rights and other legal relations of any interested party . . . whether or not further relief is or could be prayed". Judicial Code § 274d, 28 U. S. C. § 400. The fact that equity would not restrain a wrongful removal of an office holder but would leave the complainant to his legal remedies *White* v. *Berry*, *supra*, is, therefore, immaterial. A judgment which, without more, adjudicates the status of a person is permissible under the Declaratory Judgment Act. *Perkins* v. *Elg*, 307 U. S. 325, 349–350. The "declaration of a status was perhaps the earliest exercise of this procedure." H. R. No. 1264, 73d Cong., 2d Sess., p. 2. The right to hold an office or public position

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[5] As stated in the Senate Report:

"The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity . . . So now it is often necessary to break a contract or a lease, or act upon one's own interpretation of his rights when disputed, in order to present to the court a justifiable [sic] controversy. In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights . . . There seems little question that in many situations in the conduct of business serious disputes occur between parties, where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and social peace promoted. Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties." S. Rep. No. 1005, 73d Cong., 2d Sess., pp. 2–3. And see Borchard, Declaratory Judgments (2d ed.) p. 4.

against such threats is a common example of its use.[6] Borchard, Declaratory Judgments (2d ed.), pp. 858 *et seq.* Declaratory relief is the singular remedy available here to preserve the *status quo* while the constitutional rights of these appellants to make these utterances and to engage in these activities are determined. The threat against them is real not fanciful, immediate not remote. The case is therefore an actual not a hypothetical one.[7] And the present case seems to me to be a good example of a situation where uncertainty, peril, and insecurity result from imminent and immediate threats to asserted rights.

[6] The case is therefore unlike one where the moving party shows no invasion of his legal rights but only possible injury to the public (*Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125) or one where no judicial remedy for the alleged wrong has been created. *General Committee* v. *Missouri K. T. R. Co.*, 320 U. S. 323.

[7] The following are cases in which the Court has allowed actions for declaratory judgments to be entertained: *Aetna Life Ins. Co.* v. *Haworth*, *supra*, where an insured claimed and the insurance company denied, that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums; *Currin* v. *Wallace*, 306 U. S. 1, where tobacco warehousemen and auctioneers claimed the Tobacco Inspection Act was unconstitutional; *Perkins* v. *Elg*, *supra*, where one claiming to be a citizen was threatened with deportation as an alien and had been declined a passport on the same ground; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, where a third party was suing an insured and the insurer sought a judgment that it was not liable to defend the insured nor to indemnify the insured if the third party recovered; *Altvater* v. *Freeman*, 319 U. S. 359, where royalties were being demanded and paid under protest and by reason of an injunction; *Mercoid Corp.* v. *Honeywell Co.*, 320 U. S. 680, where an alleged patent infringer sought a declaration of the invalidity of the patent; *Tennessee Coal I. & R. Co.* v. *Muscoda Local*, 321 U. S. 590, where an employer sued representatives of its employees for an adjudication of whether portal-to-portal pay was due under the Fair Labor Standards Act; *Hillsborough* v. *Cromwell*, 326 U. S. 620, where a taxpayer sued in the federal court to have assessments declared invalid on the ground that they violated the federal Constitution, the state

Since the Court does not reach the constitutionality of the claims of these eleven individual appellants, a discussion of them would seem to be premature.

Second. Poole is not in the administrative category of civil service. He is an industrial worker—a roller in the mint, a skilled laborer or artisan whose work or functions in no way affect the policy of the agency nor involve relationships with the public. There is a marked difference in the British treatment of administrative and industrial employees under civil service.[8] And the difference between the two is for me relevant to the problem we have here.

The civil service system has been called "the one great political invention" of nineteenth century democracy.[9] The intricacies of modern government, the important and manifold tasks it performs, the skill and expertise required, the vast discretionary powers vested in the various agencies, and the impact of their work on individual claimants as well as on the general welfare have made the integrity, devotion, and skill of the men and women who compose the system a matter of deep concern of many thoughtful people.[10] Political fortunes of parties will ebb

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remedy being inadequate to protect the federal right; *Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, decided January 6, 1947, where a licensee sought a declaration that he owed no royalties because of the invalidity of the patent; *Order of Railway Conductors* v. *Swan*, decided January 13, 1947, where it was sought to determine which division of the National Railroad Adjustment Board had jurisdiction over railroad yardmasters. Cf. *Railway Mail Assoc.* v. *Corsi*, 326 U. S. 88, where a labor membership corporation, which did not admit negroes and was threatened with enforcement of a state statute declaring that practice of labor organizations unlawful, sued in a state court for an adjudication that the statute could not constitutionally be applied to it.

[8] Report, Committee on Parliamentary, etc., Candidature of Crown Servants (1925), pp. 12, 13.

[9] Wallas, Human Nature in Politics (2d ed.), p. 263.

[10] Fish, The Civil Service and The Patronage (1905); Meriam, Public Personnel Problems (1938), ch. XI; Mosher & Kingsley, Public Personnel Administration (1941), ch. XVIII; Kingsley, Representative

and flow; top policy men in administrations will come and go; new laws will be passed and old ones amended or repealed. But those who give continuity to administration, those who contribute the basic skill and efficiency to the daily work of government, and those on whom the new as well as the old administration is dependent for smooth functioning of the complicated machinery of modern government are the core of the civil service. If they are beneficiaries of political patronage rather than professional careerists, serious results might follow—or so Congress could reasonably believe. Public confidence in the objectivity and integrity of the civil service system might be so weakened as to jeopardize the effectiveness of administrative government. Or it might founder on the rocks of incompetency, if every change in political fortunes turned out the incumbents, broke the continuity of administration, and thus interfered with the development of expert management at the technical levels. Or if the incumbents were political adventurers or party workers, partisanship might color or corrupt the processes of administration of law with which most of the administrative agencies are entrusted.

The philosophy is to develop a civil service which can and will serve loyally and equally well any political party which comes into power.[11]

Those considerations might well apply to the entire group of civil servants in the administrative category—whether they are those in the so-called expert classification

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Bureaucracy (1944), ch. X; Morstein Marx, Public Management in the New Democracy (1940), ch. XIV; Field, Civil Service Law (1939), p. 196; Dawson, The Principle of Official Independence (1922), pp. 90 *et seq.*; Kaplan, Political Neutrality of the Civil Service, 1 Public Personnel Rev. 10; Chen, The Doctrine of Civil Service Neutrality in Party Conflicts in the United States and Great Brittain (1937).

[11] See Chen, *op. cit. supra* note 10, ch. I; Report of President's Committee on Civil Service Improvement, H. Doc. No. 118, 77th Cong., 1st Sess., ch. III.

or are clerks, stenographers and the like. They are the ones who have access to the files, who meet the public, who arrange appointments, who prepare the basic data on which policy decisions are made. Each may be a tributary, though perhaps a small one, to the main stream which we call policy making or administrative action. If the element of partisanship enters into the official activities of any member of the group it may have its repercussions or effect throughout the administrative process. Thus in that type of case there would be much to support the view of the Court that Congress need not undertake to draw the line to include only the more important offices but can take the precaution of protecting the whole by insulating even the lowest echelon from partisan activities.

So, I think that if the issues tendered by Poole were tendered by an administrative employee, we would have quite a different case. For Poole claims the right to work as a ward executive committeeman, *i. e.*, as an office holder in a political party.

But Poole, being an industrial worker, is as remote from contact with the public or from policy making or from the functioning of the administrative process as a charwoman. The fact that he is in the classified civil service is not, I think, relevant to the question of the degree to which his political activities may be curtailed. He is in a position not essentially different from one who works in the machine shop of a railroad or steamship which the Government runs, or who rolls aluminum in a manufacturing plant which the Government owns and operates. Can all of those categories of industrial employees constitutionally be insulated from American political life? If at some future time it should come to pass in this country, as it has in England, that a broad policy of state ownership of basic industries is inaugurated, does this decision mean that all of the hundreds of thousands of industrial workers affected

could be debarred from the normal political activity which is one of our valued traditions?

The evils of the "spoils" system do not, of course, end with the administrative group of civil servants. History shows that the political regimentation of government industrial workers produces its own crop of abuses. Those in top policy posts or others in supervisory positions might seek to knit the industrial workers in civil service into a political machine. As a weapon they might seek to make the advancement of industrial workers dependent on political loyalty, on financial contributions, or on other partisan efforts. Or political activities of these workers might take place on government premises, on government time, or otherwise at government expense. These are specific evils which would require a specific treatment.

There is, however, no showing of any such abuse here. What Poole did, he did on his own without compulsion or suggestion or invitation from any one higher up. Nor does it appear that what he did was done on government time or on government premises. Moreover, as MR. JUSTICE BLACK points out, laws can be drawn to punish those who use such coercion. See *Ex parte Curtis*, 106 U. S. 371. Such activity is more than the exercise of political prerogatives; it is the use of official power as well, and hence can be restrained or punished. Cf. *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769, 776–777; *Thomas* v. *Collins*, 323 U. S. 516, 543–544.

The question is whether a permissible remedy is complete or partial political sterilization of the industrial group. There is, of course, the possibility of the mobilization, whether voluntary or otherwise, of millions of employees of the federal Government and federally assisted state agencies for the purpose of maintaining a particular party or group in power. The marked increase in the number of Government employees in recent years has

accentuated the problem. The difficulty lies in attempting to preserve our democratic way of life by measures which deprive a large segment of the population of all political rights except the right to vote. Absent coercion, improper use of government position or government funds, or neglect or inefficiency in the performance of duty, federal employees have the same rights as other citizens under the Constitution. They are not second class citizens. If, in the exercise of their rights, they find common political interests and join with each other or other groups in what they conceive to be their interests or the interests of the nation, they are simply doing what any other group might do. In other situations where the balance was between constitutional rights of individuals and a community interest which sought to qualify those rights, we have insisted that the statute be "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest" of government. *Cantwell* v. *Connecticut*, 310 U. S. 296, 311. And see *Murdock* v. *Pennsylvania*, 319 U. S. 105, 116; *Thornhill* v. *Alabama*, 310 U. S. 88, 104–105.

That seems to me the proper course to follow here. The prohibition in § 9 (a) of the Hatch Act against government employees taking an "active part in political management or in political campaigns" applies without discrimination to all employees whether industrial or administrative. The same is true of the Civil Service Rules. See Rules I, § 1, XV, 5 C. F. R. Cum. Supp., §§ 1.1, 15.1. But the supposed evils are both different and narrower in case of industrial workers than they are in the case of the administrative group.[12] The public interest in the political activity of a machinist or elevator operator

[12] See Morstein Marx, *op. cit.*, *supra*, note 10, pp. 205–206; Report of the Committee on Parliamentary, etc., Candidature of Crown Servants, *supra*, note 8, p. 32; Finer, The British Civil Service (1937), pp. 203–204.

or charwoman is a distinct and different problem.[13] In those cases the public concern is in the preservation of an unregimented industrial group, in a group free from political pressures of superiors who use their official power for a partisan purpose. Then official power is misused, perverted. The Government is corrupted by making its industrial workers political captives, victims of bureaucratic power, agents for perpetuating one party in power.

Offset against that public concern are the interests of the employees in the exercise of cherished constitutional rights. The nature and importance of those rights have been fully expounded in MR. JUSTICE BLACK's opinion. If those rights are to be qualified by the larger requirements of modern democratic government, the restrictions should be narrowly and selectively drawn to define and punish the specific conduct which constitutes a clear and present danger to the operations of government. It seems plain to me that that evil has its roots in the coercive activity of those in the hierarchy who have the power to regiment the industrial group or who undertake to do so. To sacrifice

[13] As stated in Morstein Marx, *op. cit., supra*, note 10, pp. 205–206:

"The political neutrality of a postal clerk, of a conductor on the city-owned subway system in New York, of a technician in the Chicago sanitary district, or of an artisan in the labor class, does not have the same significance as the political neutrality of the prominent section chiefs of the Department of State or the political neutrality of an assistant to a commissioner in a New York City department. No discussion of the problem which ignores the *differences between categories of employees* is anything but an academic consideration of the problem. Top officialdom has such marked opportunities of shaping policy that its political behavior must be so neutral as to raise no question of a divergence in point of view between it and the executive officers of government. It is quite proper, therefore, to require the most impeccable political neutrality from such officials. But the average or typical civil servant has no more opportunity in the sphere of policy making than does the average citizen. He is entrusted with a function ministerial in nature, a routine task almost wholly unaffected by his political point of view. This principle is recognized in the English rule that industrial workers in government employment may stand for election, a privilege denied administrative employees."

the political rights of the industrial workers goes far beyond any demonstrated or demonstrable need. Those rights are too basic and fundamental in our democratic political society to be sacrificed or qualified for anything short of a clear and present danger to the civil service system. No such showing has been made in the case of these industrial workers,[14] which justifies their political sterilization as distinguished from selective measures aimed at the coercive practices on which the spoils system feeds.

[14] Whether the Act, being unconstitutional as applied to Poole, could be separably applied to civil service employees in other categories is a question I do not reach.